

90-761
No.

Supreme Court, U.S.

FILED

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JOSEPH F. SPANJOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors

CHOPIN ASSOCIATES, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its Partners, and MIAMI CENTER LIMITED PARTNERSHIP, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its GENERAL PARTNERS

Petitioners,

v.

FRED STANTON SMITH, Trustee, THE BANK OF NEW YORK, CITY NATIONAL BANK OF FLORIDA, as Trustee of Land Trust #5008793, DADE COUNTY, FLORIDA, a Municipality, JOEL ROBBINS, as Property Appraiser of DADE COUNTY, FLORIDA, FRED GANZ, as Tax Collector of DADE COUNTY, FLORIDA, RANDALL MILLER, as Executive Director of the FLORIDA DEPARTMENT OF REVENUE, S. HARVEY ZIEGLER, as Escrow Agent for the Miami Center Liquidating Trust, and HERBERT STETTIN, as Escrow Agent for Miami Center Liquidating Trust,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT M. MUSSelman
413 Seventh Street, N.E.
Charlottesville, VA. 22901
Telephone (804) 977-4500
Attorney for Miami Center Limited
Partnership and Chopin Associates

QUESTIONS PRESENTED

Whether the Abuse of Discretion Standard precludes substantive review of a bankruptcy court's approval of a compromise settlement as fair, equitable, and in the best interest of the estate *without* having made (a) a determination of the comparative priority of the respective disputed claims, and (b) a determination of the estate's net value, to avoid depleting the estate and preventing full payment to creditors with a superior right or interest in the property.

Whether the bankruptcy statutes and rules grant local governmental taxing authorities preferential treatment for statutory liens securing real property taxes, authorizing a bankruptcy court to allow participation in the distribution of the estate by permitting payment of disputed claims for which neither a timely proof of claim nor an application for the payment as administrative expenses was filed prior to a court imposed "Bar Date."

Whether a bankruptcy court has the authority to exercise subject matter jurisdiction to approve a compromise settlement of disputed real property taxes, anticipating and disposing of questions pending and not ruled upon in lawsuits which had been filed in the appropriate state court prior to the date of the commencement of proceedings in a case under title 11, and to deny a debtor's vested legal right to recover money expended to dispose of property free and clear of statutory liens to the extent of the benefit to the holder of a secured claim.

PARTIES TO THE PROCEEDINGS

Petitioner Chopin Associates (hereinafter referred to as "Chopin") is a general partnership formed in accordance with the laws of the State of Florida in October 1979. Chopin's partners are Theodore B. Gould¹ and Miami Center Corporation.

Chopin entered into an Agreement² leasing to the Petitioner Miami Center Limited Partnership the assigned

¹ On January 10, 1979, Theodore B. Gould ("Buyer"), a resident of Albemarle County, Commonwealth of Virginia, entered into an agreement to purchase Tract D, containing approximately 367,210 square feet, located in DuPont Plaza of the City of Miami, Dade County, Florida, from St. Joe Paper Company, a Florida corporation ("Seller"). The purchase price for Tract D was the sum of \$17,000,000. App. 1.

Paragraph 7 of that Agreement states that real estate taxes and assessments, and all other state, county, and municipal taxes, would be adjusted between the Seller and Buyer and prorated as of the Closing Date.

Paragraph 4 of said Agreement provided for "the closing of the sale and purchase of Tract D" under said Agreement to be on or before June 29, 1979.

On March 27, 1980, before taking title, Theodore B. Gould assigned the right to purchase 236,030 square feet of Tract D to Chopin. Thereupon, St. Joe Paper Company executed a Special Warranty Deed to Chopin for the assigned property (hereinafter referred to as the "Commercial Parcel"). App. 6.

² Article IV, *Payment of Taxes and Other Charges By Tenant*, of that Lease Agreement, provided as follows:

"A. In addition to the Rent herein agreed to be paid, Lessee agrees to render for taxation, and to pay, all Dade
(Continued on following page)

PARTIES TO THE PROCEEDINGS – Continued

property for the development of the leasehold improvements referred to as the "Miami Center."

(Continued from previous page)

County, Florida, school, and other ad valorem taxes and real property taxes and assessments and sales and use taxes payable with respect to Rent and all other payments to be made by Lessee upon which such taxes may be deemed to be due, which are or may be at any time during the term of this lease levied, assessed or imposed upon or with respect to the leased premises, or upon or with respect to the Building or personal property therein owned by Lessee or any other improvements now or hereafter situated thereon, including but not by way of limitation, all such taxes which may be levied, assessed or imposed upon the leased premises, buildings and other improvements, and fixtures, personal property and equipment therein or thereon owned by Lessee, and any assessments for streets, paving sidewalks, sewers or other public improvements made on, adjacent to or in the vicinity of the leased premises and for which the leased premises or the owner thereof, as owner, is liable. Lessor shall not be obligated to pay any such taxes or assessments; provided, . . . that Lessor agrees to pay the taxes referred to in this paragraph A of Article IV until the completion (as determined by Lessor) of construction of the Building, and upon completion. Lessee agrees to reimburse Lessor for all such taxes so paid." [Emphasis added]

Article VIII, *Subletting, Assignment and Mortgaging*, of said Lease Agreement provided as follows:

(Continued on following page)

PARTIES TO THE PROCEEDINGS – Continued

Petitioner Miami Center Limited Partnership (hereinafter referred to as "MCLP"), formed in accordance with the laws of the State of Florida in 1979, and having its principal office, books, and records located in Miami, Florida, at all times prior to the sale of its assets on October 10, 1985, was capitalized with 40 units of limited partnership interest, owned by 25 different individuals. MCLP's general partners are Theodore B. Gould and Miami Center Corporation.

MCLP, having entered into the said Lease Agreement with Chopin, owned and developed the subject leasehold improvements, a 35-story office building with 750,000 square feet of net leaseable space; a 35-story hotel with 644 rooms; and a 5-story galleria, consisting of restaurants, retail space, public areas, and parking, connecting the office building and the hotel.

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"Lessor [Chopin] shall not encumber by mortgage or deed of trust the fee estate of the leased premises without the consent of the Lessee [MCLP] and the holder of any first mortgage or deed of trust on the Lessee's leasehold estate hereunder [The Bank of New York] and *in any event any such mortgage or deed of trust placed on the Lessor's fee estate in the leased premises shall be subject and subordinate to this lease. . . . Any such mortgage or deed of trust placed on the Lessor's fee estate in the leased premises shall, to the extent it encumbers Lessee's leasehold estate hereunder, be subject and subordinate to any first mortgage or deed of trust encumbering Lessee's leasehold estate hereunder, provided however, that such subordination shall not affect the priority of such mortgage or deed of trust placed on Lessor's fee estate as a first lien upon such estate, subject nonetheless, to this lease. . . .*" [Emphasis added]

PARTIES TO THE PROCEEDINGS - Continued

Respondent The Bank of New York (hereinafter referred to as the "Bank"), a banking corporation chartered and having its principal office in the city of New York, was the interim land and construction lender for the development of the Miami Center³ pursuant to a Building Loan Agreement with MCLP entered into on March 27, 1980; a Tri-Partite Buy-Sell Agreement, entered into with Chopin and Bankers Life Insurance Company of Des Moines, Iowa⁴; and a Tri-Partite Buy-Sell Agreement with MCLP and the Metropolitan Life Insurance Company (hereinafter referred to as "MetLife").⁵

³ A Notice of Commencement of Construction was filed on April 1, 1980. Building Permit No. 80-8903 was issued on September 26, 1980, for construction of the office building. Building Permit No. 8100162 was issued on January 8, 1981, for construction of the hotel and galleria connecting the office building and hotel.

A Shell and Core Permit was issued on October 14, 1982, specifically excluding use or occupancy of the public areas or tenant spaces in the office building. App. 8. Construction was completed on May 31, 1985, excluding some tenant spaces of the office building and the retail areas of the galleria, the bankruptcy court having authorized ". . . work necessary to complete construction" and having entered an order on January 9, 1985, authorizing the debtor in possession MCLP to borrow for this purpose \$3,000,000 as a "super-priority" loan from Holywell Corporation. App. 10.

⁴ Bankers Life entered into a commitment, as amended on August 8, 1979, to provide permanent debt financing as a loan to Chopin in the amount of \$23,000,000 upon completion of construction of the leasehold improvements.

⁵ MetLife entered into a commitment under date of December 30, 1979, to provide permanent debt financing for
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PARTIES TO THE PROCEEDINGS – Continued

The Bank provided loans to MCLP and Chopin in excess of the permanent debt commitments described above of Bankers Life and MetLife, as follows:

Note and Mortgage dated May 26, 1982, made by MCLP and Chopin to BNY, in the principal amount of \$24,000,000.

Note and Mortgage dated as of August 27, 1982, made by MCLP and Chopin to BNY, in the principal amount of \$11,000,000.

Note and Mortgage dated December 2, 1982, made by MCLP and Chopin to BNY, in the principal amount of \$8,000,000.

Note and Mortgage dated December 9, 1982, made by MCLP and Chopin to BNY, in the principal amount of \$10,000,000.

Note and Mortgage dated January 20, 1983, made by MCLP and Chopin to BNY, in the principal amount of \$8,000,000.

Note and Mortgage dated June 23, 1983, made by MCLP and Chopin to BNY, in the principal amount of \$5,300,000.

Notes and Mortgage dated December 13, 1983, made by MCLP and Chopin to BNY, in the respective principal amounts of \$12,525,419.83, \$1,800,957.96, and \$87,784.33.

Note and Mortgage dated December 21, 1983, made by MCLP and Chopin to BNY, in the principal amount of \$1,916,966.59.

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the leasehold improvements of the project in the amount of \$89,500,000 upon completion of construction of these leasehold improvements.

PARTIES TO THE PROCEEDINGS – Continued

On February 26, 1985, the Bank proposed a plan of reorganization, thereafter amended, on behalf of the debtors, based upon a "modified form" of substantive consolidation of the debtors' estates,⁶ in which it offered to purchase the subject land, leasehold improvements, and certain personal property for their appraised fair market value of \$255.6 million, payable in accordance with the plan's provisions. Article IV, *Means for Execution Of The Plan*.⁷ The plan provided that the Trustee would be

⁶ On August 8, 1985, the bankruptcy court, having deferred the confirmation hearing previously scheduled for April 29, 1985, without notice or hearing entered an order confirming the amended consolidated reorganization plan filed by the Bank on the debtors' behalf, compare 11 U.S.C. Section 1128, in which it made the finding that the Bank's claim was "undersecured" and reaffirmed its approval of a "modified form" of substantive consolidation of the debtors' estates, in accordance with 11 U.S.C. Section 105(a), requiring the payment of Holywell Corporation's liabilities prior to the use of its assets to pay claims against the insolvent debtor MCLP. 54 B.R. 41, 43 (Bkrcty. S.D. Fla., 1985); affirmed *Holywell Corporation v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), vacated with instructions to dismiss, *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (1988), cert. denied, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed. 2d 46 (1988).

⁷ Article IV, *Means For Execution Of The Plan*, provided, in relevant part, as follows:

"(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be \$236,587,618. (b) BNY would pay the balance of the purchase price in cash (approximately \$19,012,382) to the Trustee. The Trustee shall be

(Continued on following page)

PARTIES TO THE PROCEEDINGS – Continued

required to deliver title of the Miami Center to The Bank of New York's designee *free and clear of all liens and encumbrances affecting Miami Center.*

The plan's Article II, *Substantive Consolidation*,⁸ provided for the elimination of MCLP's liability to Chopin for the payment of ground rent including the payment of property taxes. The plan's Article V, *Creation of Trust*, provided for the appointment of an individual "... designated as Trustee of all of the property of the estates of the debtors within the meaning of Section 541(a) of the

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required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date. (ii) pay (if requested by BNY, under protest) from such cash the Personal Property Taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date."

⁸ Article II, *Substantive Consolidation*, provided, in relevant part, as follows:

"... as a result of the substantive consolidation of the debtors, all Claims between and among the debtors are *eliminated by this Plan, including without limitation, all prepetition Claims, all Claims, if any, relating to the ground lease between Chopin and MCLP ... and all Claims of reimbursement, subrogation, and contribution, between and among all debtors.*" [Emphasis added]

PARTIES TO THE PROCEEDINGS – Continued

Code, including but not limited to Miami Center . . . and all claims and causes of action, if any, of the debtors, described in Exhibit C⁹. . . . ”

⁹ Exhibit C provides, in relevant part, as follows:

“THEODORE B. GOULD and MIAMI CENTER CORPORATION, not individually, but as general partners of CHOPIN ASSOCIATES, a Florida general partnership v. FRANKLIN BYSTROM, et al., Dade County Circuit Court, Case No. 82-23804.

Plaintiffs brought this action on December 10, 1982, to contest the 1981 real property tax assessment on the commercial or Miami Center Phase I parcel, contending that the just valuation of the subject property was \$14,825,044. The Dade County Property Appraiser assessed the subject property at \$20,070,755, and this assessment was upheld by the Property Appraisal Adjustment Board (PAAB). On March 12, 1982, Chopin Associates paid taxes of \$515,015.58, based upon the full amount of the 1981 tax bill.

THEODORE B. GOULD and MIAMI CENTER CORPORATION, not individually, but as general partners of CHOPIN ASSOCIATES, a Florida general partnership v. GRANKLIN [sic] BYSTROM, et al., Dade County Circuit Court, Case No. 83-44830.

Plaintiffs brought this action on December 23, 1983, to contest the 1982 real property tax assessment on the commercial or Miami Center Phase I parcel, contending that the just valuation of the subject property was \$14,825,044. The PAAB had granted [sic] a reduction of the Property Appraiser's assessment to \$20,062,550. On May 31, 1983, Chopin Associates made a good faith payment based upon its valuation and subsequently, pursuant to an agreed Order in this lawsuit, Chopin made an additional payment

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PARTIES TO THE PROCEEDINGS – Continued

Respondent Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust (hereinafter referred to as the

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under protest for taxes and interest based upon the amounts the Property Appraiser maintained were due.

FRANKLIN B. BYSTROM v. THEODORE B. GOULD and MIAMI CENTER CORPORATION, not individually, but as general partners of CHOPIN ASSOCIATES, a Florida general partnership, Dade County Circuit Court, Case No. 84-30837.

The Property Appraiser brought this action on August 21, 1984, after the PAAB granted a reduction of the 1983 real property tax assessment from \$99,239,500 to \$79,613,143. The taxpayer filed a counterclaim and cross-claim against the Department of Revenue, which, in turn, cross-claimed against the taxpayer. Chopin Associates had made a good faith payment of taxes in March 1984 based upon its estimate of just value of \$16,500,000. The PAAB ruled against Chopin's position that the Edward Ball Office Building and related garage structure were not substantially completed as of January 1, 1983.

ST. JOE PAPER CO. and THEODORE B. GOULD v. METROPOLITAN DADE COUNTY, FLORIDA, et al., Dade County Circuit Court, Case No. 79-19514-12.

Plaintiffs brought this action to contest the 1979 real property tax assessment of \$18,374,024 on the combined commercial and condominium parcels presently owned by Chopin Associates and Miami Center Joint Venture, respectively. Plaintiff contended that the just valuation of the subject property was \$13,600,000 on May 25, 1982. The Third District Court of Appeals held that the lawsuit had been

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PARTIES TO THE PROCEEDINGS – Continued

“liquidating trustee”), is a resident and citizen of the State of Florida. The bankruptcy court appointed Mr. Smith as Trustee of the Miami Center Liquidating Trust, C.P. 916, *after confirmation*, in accordance with the Plan’s Article V, *Creation of Trust*,¹⁰ without satisfying the statutory requirements of 11 U.S.C. Section 1104(a).

As the Plan’s proponent, the Bank retained authority at its sole discretion to terminate the rights of the Trustee

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timely filed and remanded the case to the Dade County Circuit Court for further proceedings. *St. Joe Paper Company and Theodore B. Gould, Appellants, v. Metropolitan Dade County, Florida, et al., Appellees*, Case No. 81-1258, rehearing denied September 27, 1982, 418 So. 2d 103.”

¹⁰ “ . . . [vesting in the] Trustee . . . all property of the estate of the Debtors within the meaning of Section 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors . . . to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. . . . ; (a) Enter into a Contract of Sale . . . to effect the sale of Miami Center to BNY or its designee . . . ; (c) Reduce all of the Trust Property to his possession and hold the same; (d) Sell and convert the Trust Property to cash and distribute the proceeds as specified herein; (e) Manage, operate, improve, and protect the Trust Property . . . ; . . . (u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors . . . (w) Deal with the Trust Property or any part or parts thereof . . . as would be lawful for any person owning the same . . . ; and (x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions.” [Article V, Creation of Trust, of the Amended Plan of Reorganization]

PARTIES TO THE PROCEEDINGS – Continued

and to appoint a new trustee in accordance with the Plan's Article V, *Creation of Trust*, paragraph 11.

Respondent Herbert Stettin, Esq., Escrow Agent ("Stettin"), a resident of the State of Florida, is the Trustee's attorney, having been appointed in this capacity on May 22, 1987. Respondent S. Harvey Ziegler, Escrow Agent ("Ziegler"), a resident of the State of Florida, is an attorney representing The Bank of New York. Stettin and Ziegler were appointed on February 4, 1988, by the bankruptcy court to act jointly in their capacities as Escrow Agents.

Respondent City National Bank of Florida ("CNB," formerly City National Bank of Miami), the Bank's designee as Purchaser of the Miami Center, is the trustee of a certain land trust (the "Land Trust") under an agreement dated October 10, 1985, designating M. C. Holdings Partners ("M.C. Holdings"), a New York general partnership, as its sole beneficiary, which land trust was the title holder of record of the subject real estate during the taxable years of 1986 and 1987.

Respondent Dade County, Florida ("Dade"), is a political subdivision within the meaning of Florida Constitution Article VIII, Sections 6(e) and (f), and may exercise all the powers conferred now or hereafter by general law upon municipalities created pursuant to Article VIII, Sections 9, 10, 11, and 24 of the Florida Constitution of 1885, as amended, and operating pursuant to the provisions of the Metropolitan Dade County Home Rule Charter as amended from time to time. Among other powers, the Florida Constitution of 1885, as amended and revised in 1968, Article VIII, Section (1)(b), grants to Dade County the power to "levy and collect such taxes as may be authorized by general law and no other taxes."

PARTIES TO THE PROCEEDINGS – Continued

Respondent Joel Robbins is the Property Appraiser of Dade County, Florida (hereinafter referred to as "Property Appraiser"). The Property Appraiser is a constitutional officer created by the provisions of FLA. CONST. Art. II, Section 5 and Art. VIII, Section 1(d). As a constitutional officer, the Property Appraiser is charged with the duty to "secure a just valuation of all property for *ad valorem* taxation" pursuant to the provisions of FLA. CONST. Art. VII, Sections 4 and FLA. STAT. ANN. Sections 193.011, 193.023, 193.042, and 193.114(1).

Respondent Fred Ganz is the Tax Collector of Dade County, Florida (hereinafter referred to as "Tax Collector"). The Tax Collector is a constitutional officer created by the provisions of FLA. CONST. Art. II, Section 5, and Art. VIII, Section 1(d). As a constitutional officer, the Tax Collector is charged with the duty to "collect all *ad valorem* taxes for municipalities within his county." FLA. STAT. ANN. Section 193.116(2).

Respondent Randall Miller is the Executive Director of the Florida Department of Revenue (hereinafter referred to as "The Department of Revenue"). The Department of Revenue is charged by the provisions of FLA. STAT. ANN. Sections 193.023(3), 195.052(6), and 193.085(2), 193.114(2), and 193.1142, *et seq.*, with overseeing the actions of the Property Appraiser in certain key respects.

St. Joe Paper Company (hereinafter referred to as "St. Joe"), a Florida corporation, in which the debtors have *no* interest, is an interested party. St. Joe's complaint in the Eleventh Judicial Circuit in and for Dade County alleging its entitlement to a refund in the amount of \$147,871.00 with respect to the real property taxes paid in the amount of \$569,177.00, as the owner of record of the subject property in 1979, was vested in Fred Stanton Smith, as

PARTIES TO THE PROCEEDINGS – Continued

Trustee of the Miami Center Liquidating Trust¹¹ by Article V, *Creation of Trust*, Exhibit C, of the Bank's Plan.

Although not parties to the pending appeal, the United States of America and the Commonwealth of Virginia are interested parties, since no provision was made in the confirmed amended consolidated reorganization plan for the payment of federal and state income taxes incurred during the bankruptcy court's administration of the estate and arising from the liquidating trustee's sale of the Miami Center in execution of the Plan.¹²

¹¹ The bankruptcy court's approved settlement includes cancellation of St. Joe's right to this refund, notwithstanding the fact that this claim for refund is exclusively the property of St. Joe and was never property of the debtors' estates upon the date of commencement of these proceedings or thereafter, and that St. Joe was never at any time made a party to the proceedings in the bankruptcy court below.

¹² *Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust v. The United States of America, Miami Center Limited Partnership, Holywell Corporation, Theodore B. Gould, et al.*, 85 B.R. 898, 903 (Bkrtcy. S.D. Fla. 1988): "[T]he liquidating trustee is not responsible to file federal income tax returns or to pay income taxes, if any are due and owing, resulting from the sale of the Miami Center or the Washington properties." Affirmed S.D. Fla. Nos. 88-0795-Civ-JWK and 88-1053-Civ-JWK, July 30, 1989. The Eleventh Circuit affirmed, holding that there was not an express provision in the plan for the payment of taxes and statutory provisions do not obligate the liquidating trustee to file income tax returns or pay taxes, having concluded, in relevant part, as follows:

"The government suggests that because the liquidating trustee was appointed by a court which acquired jurisdiction by virtue of 11 U.S.C. Section 105, we

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PARTIES TO THE PROCEEDINGS – Continued

The Miami Center Joint Venture (hereinafter referred to as "MCJV"), a Florida general partnership, consisting of Olympia & York Florida Equity Corporation and Theodore B. Gould, is also an interested party. As of October 31, 1990, MCJV has an Allowed Claim in the amount of \$21,680,540, which remains unpaid, notwithstanding the fact that the established priority of said claim was *superior* to all or part of the Bank's liens, as well as to the

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should construe the liquidating trustee's appointment as that of a trustee under Title 11. Alternately, the government argues that the liquidating trustee is either an assignee, receiver, or fiduciary of the debtors and thus governed by the requirements of 26 U.S.C. Section 6012. Based on our review of the statutory provisions, we agree with the district court's conclusion that 26 U.S.C. Section 6012 does not apply in this case. By its terms, section 6012 refers only to trustees who are appointed under Chapter 11 of the Bankruptcy Code. If Congress had intended that all trustees be subjected to the provisions of section 6012, it would have so provided. We also conclude that section 6012 was not intended to apply to a broad range of individuals without regard to the functions which they perform." App. 25 and 26.

A dissenting opinion was filed concluding that "both Section 6012(b)(3) and (4) apply to the liquidating trustee" and raised the question of where the money will come from to fulfill the majority opinion that the United States may collect the taxes on the postconfirmation sale of the insolvent debtor MCLP's property from the reorganized debtor. App. 31.

PARTIES TO THE PROCEEDINGS – Continued

rights of general and unsecured creditors. The Bank's Plan wrongfully subordinated MCJV's claim.¹³

Other interested parties include Holywell Leasing Company, Holywell Telecommunications Company, Parkwell, Inc., Orion Industries, Inc., Holywell Construction Company, Charleston Center Corporation, 1300 North 17th Street Associates, Eleven DuPont Circle Associates, Pietro Belluschi & Associates, Inc., Holywell Management of Florida, Inc., Orion Engineering Services, Whitehall Building Services, and Whitehall Security Corporation (hereinafter collectively referred to as the "Affiliated Creditors"). The Bank's Plan subordinated the unpaid Allowed Claims of the Affiliated Creditors into Class 8, granting a superior priority to the other general unsecured creditors.¹⁴

¹³ See 11 U.S.C. Section 510(c); *Olympia & York Florida Equity Corp. and Miami Center Joint Venture v. The Bank of New York*, No. 85-3230-Civ-Atkins, (S.D. Fla., March 24, 1987), reversed the bankruptcy court's Confirmation Order, concluding that the plan wrongfully subordinated MCJV's claim, and thus, that the plan did not satisfy 11 U.S.C. Section 1129(b)(1); affirmed *In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990), holding that the plan did not satisfy 11 U.S.C. Section 1129(b)(1) and that the Bank was liable for the payment of MCJV's claim.

¹⁴ *Contra* 11 U.S.C. Section 510(c); *In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977); *In re U.S. Truck Co.*, 800 F.2d 581 (6th Cir. 1986); *Olympia & York Florida Equity Corp. and Miami Center Joint Venture*, No. 85-3230-Civ-Atkins [". . . the insider label is not sufficient, in and of itself, to justify the subordination of a claim. Insiders' claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors."]

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No. _____

In The

Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors

CHOPIN ASSOCIATES, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its Partners, and MIAMI CENTER LIMITED PARTNERSHIP, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its GENERAL PARTNERS

Petitioners,

v.

FRED STANTON SMITH, Trustee, THE BANK OF NEW YORK, CITY NATIONAL BANK OF FLORIDA, as Trustee of Land Trust #5008793, DADE COUNTY, FLORIDA, a Municipality, JOEL ROBBINS, as Property Appraiser of DADE COUNTY, FLORIDA, FRED GANZ, as Tax Collector of DADE COUNTY, FLORIDA, RANDALL MILLER, as Executive Director of the FLORIDA DEPARTMENT OF REVENUE, S. HARVEY ZIEGLER, as Escrow Agent for the Miami Center Liquidating Trust, and HERBERT STETTIN, as Escrow Agent for Miami Center Liquidating Trust,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Chopin Associates and Miami Center Limited Partnership respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on September 18, 1990, denying the Petition For Rehearing And Suggestion Of Rehearing In Banc upon that court's original opinion, entered on August 14, 1990, concluding that (a) the United States Bankruptcy Court for the Southern District of Florida had the authority to approve a settlement, anticipating and disposing of questions concerning the Dade County Property Appraiser's tax assessment practices pending in State court prior to the filing date of the bankruptcy proceedings and denying as moot a debtor's vested legal right to recover money expended to dispose of a secured creditor's collateral; and that (b) the district court did not abuse its discretion in affirming the bankruptcy court's approval of a settlement *without* a determination having been made of the priority of the *unfiled* claims for the disputed real property taxes and of the estate's net value, to avoid depleting the estate and depriving creditors with a superior right or interest in the property of full payment.

OPINIONS BELOW

The opinion of the United States Court of Appeals, entered on August 14, 1990, is printed in the Appendix hereto ("App. ____") at App. 32. The lower court opinions which are the subject of the appeal below and relevant to the Court's consideration of this petition are also printed in the Appendix.

STATEMENT OF JURISDICTION

Petitioners filed an appeal to the Eleventh Circuit Court of Appeals from an order of the United States District Court for the Southern District of Florida, entered on July 6, 1989, App. 34, affirming the bankruptcy court's opinion approving an amended settlement of the *ad valorem* tax claims, concluding that (a) the failure to file a

timely proof of claim or an application for the payment of administrative expense for disputed claims did *not* bar participation in the distribution of the debtor's estate, and (b) denying as moot the debtor's vested legal right to recover any money expended to dispose of the property securing a secured creditor's claim. App. 43. The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. Section 1254(1).

PERTINENT STATUTORY PROVISIONS

The applicable provisions of the Bankruptcy Code are as follows:

11 U.S.C. Section 502(b) provides, in relevant part, " . . . if [an] objection to a claim is made, the court, after a notice and a hearing, shall determine the amount of such a claim . . . as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that . . . (3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property. . . . "

11 U.S.C. Section 503(b) provides, in relevant part, "[a]fter notice and a hearing, there shall be allowed administrative expenses . . . including (1) . . . (B) any tax (i) incurred by the estate, except a tax of a kind specified in section 507(a)(7) of this title. . . . "

11 U.S.C. Section 506(c) provides that "[t]he trustee [debtor in possession] may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim."

11 U.S.C. Section 545 provides, in relevant part, that "[t]he trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien (1) first becomes effective against the debtor (A) when a case under this title concerning the debtor is commenced; . . . (D) when the debtor becomes insolvent. . . . "

STATEMENT OF THE CASE

On February 29, 1988, Chopin and MCLP filed a Complaint For Declaratory, Injunctive, And Other Relief, App. 45, against the Respondents, alleging, *inter alia*, that although the Dade County Property Appraiser and Tax Collector had actual or constructive notice of the Debtors' filings of petitions for reorganization, (a) no proofs of claim were filed for the disputed real property taxes for the years 1982 and 1983;¹⁵ (b) no application for the payment as an administrative expense was filed for the real property taxes assessed on the property for the years 1984 and 1985;¹⁶ (c) the value of MCLP's interest in the Miami Center Property did *not* exceed the amount of the outstanding mortgage indebtedness for the years 1982 through 1985; and (d) that the liquidating trustee wrongfully allowed the Purchaser to take a credit against the purchase price of the Miami Center in the amount of \$4,291,625.46, App. 57, for the estimated real property taxes for 1985, contrary to the provisions of Art. IV, *Means For Execution Of The Plan*.¹⁷ The Petitioners' prayer for relief was, *inter alia*, as follows:

¹⁵ On December 27, 1984, the bankruptcy court entered an order designating January 15, 1985, as the final date ("Bar Date") by which creditors were permitted to file a proof of claim against the debtors' estates. Dade County did not file a timely proof of claim and did not request leave of the bankruptcy court to file a proof of claim after the Bar Date.

¹⁶ On September 27, 1985, the bankruptcy court entered an order requiring that the application for all administrative expenses be filed no later than October 17, 1985. The Dade County Tax Collector did not file a timely application for administrative expenses in accordance with 11 U.S.C. Section 503(b)(1)(B)(i) and did not request leave of the bankruptcy court to file thereafter a request for payment of the 1984 and 1985 real property taxes as an administrative expense.

¹⁷ On October 10, 1985, the liquidating trustee entered into an Amended Contract of Sale with the Purchaser CNB. The

(Continued on following page)

"Enforce the injunction of 11 U.S.C. Section 524 against the commencement or continuation of any action by Defendants DADE, PROPERTY APPRAISER, TAX COLLECTOR, and EXECUTIVE DIRECTOR, the employment of process, or any other act, to collect, recover, or offset any debt as a personal liability of the TRUST, and against the commencement or continuation of any action, the employment of process, or any other act, to collect or recover from, or offset against property of the TRUST as a result of their failure to file a Proof of Claim before the

(Continued from previous page)

Amended Contract's paragraph 13 provided pursuant to a post-confirmation modification, entered into *without notice, hearing, or court approval*, as required under 11 U.S.C. Section 1127(b), for the establishment of an " . . . escrow from the closing proceeds due Seller sufficient funds to pay the 1983 and 1984 real estate and personal property taxes together with interest calculated at eighteen percent (18%) for one year from the Closing Date with an escrow agent acceptable to Purchaser and Seller."

Paragraph 13 also granted the Seller " . . . the right to continue to contest the *ad valorem* tax assessments on the property for the years 1983, 1984, and 1985, on behalf of the Purchaser, including all rights to prosecute the actions commenced by Chopin or MCLP" in Dade County Circuit Court, and provided as follows:

" . . . that Purchaser shall be permitted to make the determination to dismiss or settle any such tax protests, suits or claims in the event Purchaser determines, it [sic] its sole judgment, that it is in the best interest of the Purchaser to do so."

"If Purchaser elects, in its sole discretion, to have Seller dismiss or settle any such tax protests, suits or claims, Purchaser shall indemnify, defend and hold Seller harmless for and against any and all loss or damage Seller may incur as a result of any claims or actions that arise as a result of Seller discontinuing, dismissing, or settling any such tax protests, suits, or claims."

bar date of January 15, 1985, or an Application for Administrative Expense before the Effective Date of the Plan's confirmation, October 10, 1985."

"Order Defendants BNY and CNB, jointly and severally, to pay into the Miami Center Liquidating Trust, for the benefit of Plaintiffs, the sum of \$4,291,625.46 plus interest thereon from October 10, 1985."

"Declare that Defendant BNY, pursuant to its Letter of Indemnity, is liable to the Miami Center Liquidating Trust, for the benefit of Plaintiffs, for any and all sums for which the funds presently possessed by the Trustee or the Escrow funds are payable to the Dade Defendants."

On March 23, 1988, the Respondent liquidating trustee filed a "Motion For Hearing On And Approval Of Compromise Of Ad Valorem Tax Claims," App. 59, proposing to accept a settlement of disputed real property taxes negotiated with Dade County by representatives of the Respondents CNB and Bank for the period from 1979 through 1987.

The Motion For Hearing stated, pertinent to the pending appeal, as follows:

"The settlement proposal requires that the court approve the settlement and direct payment of the claims set forth in the agreement to the Dade County Tax Collector. Such payment shall be in full and complete settlement of all claims or issues between these parties, as well as for the discharge of any liens which might have been or are presently attached to the property in question for the years 1979-85."

Respondent Dade County's settlement offer, dated February 24, 1988, App. 63, was subject to the following conditions:

"It is understood that each and every provision of this agreement is dependent upon and tied to each and every other provision hereof, and not

severable. Moreover, by operation of the provisions of this agreement, Dade County shall receive the sum of \$12,288,907.09 on or before March 31, 1988." App. 66.

" . . . in conjunction with the Liquidating Trustee's obtaining authorization for payment from the Bankruptcy Court, the Trustee shall also obtain an order from the Bankruptcy Court directing him, as the real party in interest in these tax matters, to be substituted in each of the pending Circuit Court actions for 1979 through 1985. Such substitution shall be ordered by the Court for the purpose of effectuating the necessary voluntary dismissal or execution of interrogatories and obtaining of a final judgment modifying the particular assessment at issue." App. 64 and 65.

" . . . it is further understood and agreed by these parties that the City National Bank/Bank of New York shall pay to the Dade County Tax Collector on or before March 31, 1988, the sum of \$6,141,697.88 for 1986 and 1987 real property taxes, and 1987 personal property taxes."

On August 29, 1988, the Respondents filed a "Stipulation Amending Settlement of *Ad Valorem* Tax Claims," App. 68, imposing upon the estate the assessed value of \$162,500,000 for 1984 and 1985, the same assessed value as for the years 1986 and 1987, after Miami Center's sale to City National Bank.

On November 18, 1988, the bankruptcy court entered an order concluding that ". . . Dade county is not barred from asserting a claim in these proceedings by reason of its failure to file proofs of claim in the Chapter 11 proceedings for *ad valorem* taxes for any of the years 1979 through 1985," App. 85, and approved the stipulation amending the proposed settlement, *without* a determination of (a) the comparative priority of the nonfiled claims for the disputed real property taxes and (b) the estate's net value.

On July 6, 1989, the district court affirmed the bankruptcy court's approval of the proposed settlement based

upon the following analysis of the Abuse of Discretion Standard defined in *Matter of Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980):

"The purpose of such a test is to ensure that the bankruptcy court has before it sufficient facts to permit an informed, independent evaluation of the proposal. *Matter of AWECO, Inc.*, 725 F.2d 293, 299 (5th Cir. 1984); see also *In Re American Reserve Corp.*, 841 F.2d 159, 162 (7th Cir. 1987) (bankruptcy court cannot merely 'rubber stamp' the settlement proposal).

The reviewing court's primary duty is to determine whether the compromise approved by the bankruptcy court is 'fair, equitable, and in the best interest of the estate.' *Jackson*, 624 F.2d at 608; see also *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986) (reviewing court must determine whether the settlement is reasonable on the facts of the case). To discharge this duty, the reviewing court must determine, first, that there existed a 'substantial factual basis for the compromise' and, second, that the bankruptcy court has drawn 'articulate findings and conclusions' from that factual basis. *Jackson*, 624 F.2d at 608. If this test is passed, the reviewing court 'may not reverse absent some other abuse . . . of . . . discretion.' *Id.* (relying on *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960)). When conducting this inquiry, the reviewing court must, of course, uphold factual findings that are not clearly erroneous, see Fed. R. Civ. P. 52, and it must always bear in mind that public policy favors settlement over protracted, costly litigation.

Applying these principles to the facts of the present case, the court concludes that the bankruptcy court's ruling should be affirmed. The bankruptcy court conducted a searching *Jackson* inquiry, and it approved the proposal only after the proceedings yielded a welter of evidence bearing on the propriety of settlement."

REASONS FOR GRANTING THE WRIT

- I. **The Abuse Of Discretion Standard In The Administration Of The Bankruptcy Laws Precludes A Bankruptcy Court's Approval Of A Settlement Without A Determination Of The Comparative Priority Of The Claims Against The Estate And A Determination Of The Estate's Net Value, To Avoid Depleting The Estate And Preventing Full Payment To Creditors With A Superior Right Or Interest In The Property.**

The principal reason for granting the Writ is that the Eleventh Circuit's application of the Abuse of Discretion Standard, affirming the district court's conclusion that the bankruptcy court did not abuse its discretion in approving the proposed settlement of disputed real property taxes, negotiated by representatives of the defendants CNB and the Bank on behalf of the defendant liquidating trustee, is in direct conflict with the opinions of the Fifth Circuit Court of Appeals in *Matter of AWECO, Inc., supra*, and the Seventh Circuit's opinion rendered in *In re American Reserve Corp., supra*.

Although the district court's opinion relied upon the Fifth Circuit's analysis in *AWECO* of the Abuse of Discretion Standard defined in *Jackson*, the Fifth Circuit's opinion in *Matter of AWECO, supra*, a case very similar to this, concluded pertinent to the approval of the amended settlement of the disputed real property taxes as "fair and equitable" as follows:

"Regardless of when the compromise is approved, looking only to the fairness of the settlement as between the debtor and the settling claimant contravenes a basic notion of fairness. *An estate might be wholly depleted in a settlement of junior claims – depriving senior creditors of full payment – and still be fair as between the debtor and the settling creditor.* Our understanding of bankruptcy law's underlying policies leads us to make a limited extension of the fair and equitable standard: *a bankruptcy court abuses its discretion in approving a settlement with a junior*

creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors." (Emphasis added) *Id.* at 298.

"The duty of a bankruptcy judge to reach an 'intelligent, objective and educated evaluation' of settlements cannot be carried out absent a sufficient factual background. *Matter of Jackson Brewing Co., supra*, 624 F.2d at 602. This requisite factual background assumes particular importance with respect to determinations hinging on the fair and equitable standard. A decision on whether a settlement with a junior creditor depletes the estate so severely as to endanger senior claims requires full and accurate information about the net value of estate assets. . . . An approval of a compromise, absent a sufficient factual foundation, inherently constitutes an abuse of discretion." (Emphasis added) *Id.* at 299.

The district court also misplaced its reliance upon the Seventh Circuit's opinion in *In re American Reserve, supra*, for the principle that the bankruptcy court did not abuse its discretion in approving the Amended Settlement as "fair, equitable and in the best interest of the estate." The Seventh Circuit's analysis of the "fair and equitable" principle in *American Reserve* was as follows:

"'Fair and equitable' is a term of art that means that "'senior interests are entitled to full priority over junior ones.' " *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir.) (citation omitted), cert. denied, 469 U.S. 880, 105 S.Ct. 244, 83 L.Ed. 2d 182 (1984). In a settlement context, 'fair and equitable' means that the settlement reasonably accords with the competing interests' relative priorities. . . . [I]n comparing the settlement's terms with the litigation's probable costs and probable benefits, the central inquiry in determining whether a proposed settlement is in an estate's best interests, the bankruptcy judge must necessarily examine the relative priorities of the contested claim and the estate's other claims. Claims with different priorities will have different settlement values." (Emphasis added) 841 F.2d at 162.

In the present case, although the bankruptcy judge made no findings concerning the priority of the Dade County Tax Collector's disputed claims for the payment of real property taxes for 1982, 1983, 1984, and 1985, and no determination was made of the net value of the estate's assets, the district court concluded that such a factual background was *not* necessary relying upon the following erroneous finding of fact:

"The confirmation plan . . . required the Liquidating Trustee, at the 1985 closing, to escrow part of the property's purchase price to cover any outstanding *ad valorem* taxes. . . ." (Emphasis added) App. 35 and 36.

In fact, the Bank's plan as confirmed contained no such provision. The purpose of the establishment of the escrow, segregating the funds for the payment of the real property taxes, was to provide a basis for the discharge of the Dade County Tax Collector's liens *without* having determined the priority of the disputed claims,¹⁸ and to

¹⁸ The record of the proceedings in the case concerning the establishment of the escrow is pertinent to the consideration of the present appeal. During an adversary hearing on January 26, 1988, concerning the escrow in the bankruptcy court, the following colloquy occurred:

CITY NATIONAL BANK: "This is a matter that is under the plan and under the Closing established for the plan for the sale of the real estate. *The Bank was entitled to receive the property free of existing real estate tax liens, separate and distinct from the claims in bankruptcy.*" Bkrtcy., S.D. Fla., Transcript, p. 23. [Emphasis added]

MR. STETTIN: "The reason for this lawsuit is very simple. They [City National Bank] are afraid that the Internal Revenue Service is going to get a priority and a right of payment over these funds. So they need an adjudication that these funds are escrowed for a specific purpose, to pay *ad valorem* taxes. . . .

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provide a legal basis for the undisputed fact that the liquidating plan¹⁹ did *not* provide for the payment of

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The only purpose of this lawsuit is to ensure that they can keep a hand on these monies free of the IRS." *Id.* at 24-25.
[Emphasis added]

THE COURT: "Is there any opposition to the fact that [this fund] is to be used for [*ad valorem* property] taxes?"

MR. STETTIN: "The Contract of Sale which was incorporated into the plan . . . said that the Seller would cause the payment of the taxes in question. It didn't say escrow them to continue a pending dispute with Dade County on these *ad valorem* taxes. It said they would be paid. That was the way the plan was confirmed, included that Contract of Sale. . . . That was a modification of the plan clearly. . . . No Disclosure Statement. No vote. 1127(b) and (c) clearly require that. If that is all there were, I would agree it was an illegal modification of the plan. . . ."

THE COURT: "But are you still asking the court to make a determination that this fund is set up for the payment of taxes?"

MR. STETTIN: ". . . I have no objection based on my rationale that even though it was not done [as] 1127 requires, in fact it was done, and the district court and the court of appeals for the Eleventh Circuit have blessed it."

MR. GOULD: "Even if the funds were placed in an escrow, that escrow would still have a subordinate priority. . . . [It] would still have to [be] decide[d] whether or not the county had a valid claim against the estate."

¹⁹ The Eleventh Circuit's "mootness" ruling precluded granting judicial relief since "The debtors' property passed to

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income taxes arising from the sale of the insolvent debtor MCLP's property.²⁰

Although the plan made no provision for the payment of income taxes to the United States arising from the sale of the property, the bankruptcy court's approval of the settlement will cause the following distribution from the estate's property plus interest at an annual rate of twelve (12) percent to discharge the statutory real

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the Liquidating Trustee and the debtors were discharged under Code Section 1141." *Miami Center*, 838 F.2d 1547, 1552 (1988).

²⁰ On September 18, 1990, the Eleventh Circuit held that since the confirmed plan made no express provision for the payment of federal income taxes arising from the Miami Center's sale, in accordance with the liquidating plan's provisions, the liquidating trustee is not responsible for the payment of such taxes. *Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust v. United States of America, Miami Center Limited Partnership, Chopin Associates, et al.*, App. 13. Compare *Beaston v. The Bank of Delaware*, 12 Pet. 102, 136 (1838): "No one can be divested of his property, by any mode of conveyance, statutory or otherwise, unless at the same time, and by same conveyance, the grantee becomes invested with title. . . . The moment the transfer of property takes place, under statute, the person taking it, whether by voluntary assignment or by operation of law, becomes bound to the United States for the faithful performance of the trust." [Emphasis added]

property prepetition liens and pay the disputed postpetition real property taxes as an administrative expense:

1982	\$ 64,979
1983	96,426
1984	4,647,825
1985	3,815,375
Interest at March 31, 1988	775,340
TOTAL:	<u><u>\$9,382,945</u></u>

The Eleventh Circuit's affirmation of the district court's misconstruction of the analysis of the Fair and Equitable Standard is also inconsistent with this Court's guidelines defined in *Protective Committee v. Anderson*, 390 U.S. 414, 435, 441 (1967). In *Protective Committee*, this Court held, in relevant part, as follows:

"[A] plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it (footnote omitted)."

" . . . a bankruptcy court is not to approve or confirm a plan of reorganization unless it is found to be 'fair and equitable'. This standard incorporates the *absolute priority doctrine* under which creditors and stockholders may participate only in accordance with their respective priorities. . . . [citation omitted] Since the determination of insolvency was not made in accordance with the proper standards of valuation, *neither the approval or the confirmation of the plan can stand.*" (Emphasis added)

This Court's definition of the Absolute Priority Doctrine in *Northern Pacific Railway v. Boyd*, 228 U.S. 482, 504 (1912) is applicable in this case to the treatment of the superior rights of the United States in the proceeds from the sale of the insolvent debtor MCLP's property:²¹

²¹ See *King v. United States*, 379 U.S. 329, 337 (1964), citing *Bramwell v. United States Fidelity and Guaranty Co.*, 269 U.S. 483

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"If purposely . . . a single creditor was not paid, or provided for in reorganization, he could assert his superior rights against the subordinate interests . . . in the property transferred . . . , [since] the property was a trust fund charged primarily with the payment of . . . liabilities." (Emphasis added)

Section 1129(d) provides, in relevant part, that a court may not confirm a plan "if the principal purpose of the plan is the avoidance of taxes," and Section 1129(a)(3) requires that the plan be proposed in good faith and not by any means forbidden by law. The Feasibility Standard, Section 1129(a)(11), required that the bankruptcy court assure itself that confirmation of the plan was not likely to be followed by the need for further financial reorganization of the debtors, that reorganization would succeed, and therefore, in accordance with the Bankruptcy Reform Act's legislative history, the debtors' "fresh start" would not be burdened with the responsibility for the payment of income taxes arising from the sale of the insolvent MCLP's property and the United States would not lose taxes which the Internal Revenue Service had not had a reasonable time to collect.²²

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(1926): "*The decisions of this court show that no lien is created by the statute; that priority does not attach while the debtor continues the owner and in possession of the property; that no evidence can be received of insolvency of the debtor until he has been divested of his property . . . and that whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property.*" [Emphasis added]

²² See S. Rep. No. 95-989, 95th Cong. 2d Sess. 13-14, reprinted at 1978 U.S. Code Cong. & Adm. News 6787. See *United States v. Energy Resources*, 110 S.Ct. 2139, 2142 (1990): "The Code . . . requires the bankruptcy court to assure itself that reorganization will succeed, Section 1129(a)(11), and

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The Eleventh Circuit's opinion that the bankruptcy court did not abuse its discretion in approving the settlement for the payment of disputed real estate taxes for the purpose of discharging statutory liens on the property and that the confirmed plan made no provision for the payment of income taxes arising from the sale of the insolvent debtor MCLP's property precludes the conclusion that the confirmed plan was fair and equitable to the United States.²³

II. Local Governmental Taxing Authorities Have Not Been Granted Preferential Treatment Under The Bankruptcy Statutes And Rules Which Instead Preclude Participation In The Distribution Of The Estate Because Of The Failure To File Timely Proofs Of Claim Or An Application For Payment Of Administrative Expenses For Disputed Real Property Taxes.

A Writ should be issued to determine whether a bankruptcy court has statutory authority to confirm a plan granting a local governmental taxing authority preferential treatment, which provides for the Dade County Tax Collector's participation in the distribution of the estate, notwithstanding his failure to file timely proofs of claim or an application for payment as administrative expenses of disputed real property taxes.

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therefore that the IRS, in all likelihood, will collect the tax debt owed. . . . Even if consistent with the Code . . . a bankruptcy court order might be inappropriate if it conflicts with another law [i.e., the Internal Revenue Code] that should have been taken into consideration in the exercise of the court's discretion."

²³ On October 2, 1990, the Eleventh Circuit affirmed the district court's *reversal* of the bankruptcy court's Confirmation Order and conclusion that "The plan, as structured, is not fair and equitable," and, thus, does not satisfy 11 U.S.C. Section 1129(b)(1). *In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990)

Local governmental taxing authorities are *not* entitled to preferential treatment under the bankruptcy statutes and rules. As the Second Circuit stated, in *In re Parr Meadows Racing Association, Inc.*, 880 F.2d 1540, 1547 (2nd Cir. 1989), “[the] rationale [of the bankruptcy statutes and rules is] that all creditors of a bankrupt estate . . . shall receive fair and equal treatment.”

Section 101(9)(A) defines a “creditor” as an “entity” that has a claim against the debtor that arose at the time or before the order for relief concerning the debtors, and Section 101(14) defines an “entity” as a “person, estate, trust, governmental unit.”

In the present case, the most important question is whether the bankruptcy court had authority to confirm a plan requiring a liquidating trustee, appointed under the plan, to pay disputed real property taxes from the property’s sale proceeds in order to convey title *free and clear* of liens, although the plan made no provision for the payment of income taxes arising from the sale of the insolvent debtor MCLP’s property. The Eleventh Circuit has concluded that post-confirmation income taxes arising from the sale of the debtor’s property in accordance with the plan’s provisions are not recoverable as an administrative expense since the “administration of the estate ceases upon confirmation of a plan of reorganization,” App. 24, “the government [was not] without the ability to collect taxes on the post-confirmation sale of the property. It simply means that the reorganized debtor, not the liquidating trustee, is responsible for such taxes.” App. 24.

The flaw in the Eleventh Circuit’s analysis is illustrated by the problem raised in the dissenting opinion that, although the liquidating trustee has possession of the proceeds of the sale of the debtor’s property and all of the cash of the related debtors, approval of the settlement for the disputed property taxes depletes the debtors’ estate by \$9,382,945 plus interest, while “It remains unclear from where that money will come,” App. 31, for the payment of income taxes.

The proper rule for the administration of the bankruptcy laws concerning statutory liens was stated in *In re Simmons*, 765 F.2d 547, 556 (5th Cir. 1985):

"It is clear under the Code that any statutory lien that is valid under state law remains valid through bankruptcy unless invalidated by some provision of the Code. Section 545 delineates those circumstances in which a trustee may avoid a statutory lien."

However, "[a] 'claim' is distinct from a 'lien,' " *Id.* at 555. 11 U.S.C. Section 101(4) provides, in relevant part, that a "claim" means a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, secured, or unsecured. . . ." Section 101(31) defines a "lien" as a "charge against or interest in property to secure payment of a debt or performance or an obligation."

It is undisputed that Dade County had perfected statutory liens against the debtors' property under Florida law for the years prior to the date of the commencement of the proceedings and that a valid lien could not have been perfected against the property *after* the filing date, as a matter of law. 11 U.S.C. Section 362. See *Equibank, N.A. and Farmers' Home Administration v. Wheeling-Pittsburgh Steel Corporation*, 884 F.2d 80 (3rd Cir. 1989).²⁴

²⁴ The Third Circuit held as follows:

"Section 362(a)(4) provides that the filing of a bankruptcy petition 'operates as a stay, applicable to all entities, of . . . (4) any act to create, perfect or enforce any lien against the property of the estate'. . . . By its terms, the automatic stay would not affect the secured status of a tax that had attained lien status, but it prevents the creation of a lien postpetition." 884 F.2d at 84.

See also *In re Parr Meadows Racing Association, Inc., supra*, at 1545; *In re Bellman Farms, Inc.*, 86 B.R. 1016, 1020 (D.S.D. 1988);

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The bankruptcy statutes and rules draw a fundamental distinction between the provisions which deal with the requirements for filing a proof of claim, and its effect on the administration and distribution of the estate's property, and a lien securing a debt which gives rise to a claim. *In re G. S. Omni Corp.*, 835 F.2d 1317, 1318 (10th Cir. 1987). Bankruptcy Rule 3003(c)(2) provides, in relevant part, as follows:

"Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by . . . this rule; *any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of . . . distribution.*"

[Emphasis added]

Thus, Bankruptcy Rule 3003(c)(2)'s plain meaning is that any creditor who does not have an allowed claim, and wishes to participate in the distribution of an estate's property is required to file a timely proof of claim or application for the payment of administrative expense. *Omni*, 835 F.2d at 1318.

The present case is similar to *In re American Properties, Inc.*, 30 B.R. 239 (Bankr. D. Kan. 1983). The governmental taxing authority of Salina County, Kansas, held a tax lien against the debtor's property. The county was listed in the debtor's schedules, but failed to file a proof of claim. When Salina County tried to enforce its lien *after* confirmation, the court held that the county's claim to participate in distribution of the estate's property was barred by its failure to file a timely proof of claim. 30 B.R. at 247.

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In re Ballentine Bros., Inc., 86 B.R. 198, 200 (D.Neb. 1988); *In re Stack Steel & Supply Co.*, 28 B.R. 151, 155 (W.D. Wash. 1983); *H & H Beverage Distributors v. Department of Revenue*, 850 F.2d 165, 170 n. 6 (3rd Cir. 1988); *In re Carlisle Court, Inc.*, 36 B.R. 209, 214 (D.D.C. 1983).

Although the Eleventh Circuit's precedent in the administration of the bankruptcy laws does *not* grant preferential treatment to governmental taxing authorities and nonfiling creditors are barred from participating in the distribution of the estate's property,²⁵ the district court below concluded that this "argument raises an novel issue of law that has not been decided in this circuit," App. 41, and held as follows:

"Bankruptcy Rule 3003(c)(2) prevents certain nonfiling creditors from being treated as such for purposes of 'voting or distribution'; but the Rule does not 'prevent such a creditor from otherwise participating in the case.' 8 Collier on Bankruptcy, Section 3003.05[3] & n. 8 (15th Ed. 1989). *It is therefore not clear whether Rule 3003(c)(2) bars Dade County's claims in the present case; the County's success or failure depends on whether receipt of settlement proceeds constitutes proscribed 'distribution' or 'mere participation in the case'.*" [Emphasis added]

The Eleventh Circuit's affirmance of the bankruptcy court's approval of the settlement of the disputed property taxes, allowing the Dade County Tax Collector to participate in distribution of the estate's property, notwithstanding his failure to file a timely proof of claim or application for the payment of the taxes as an administrative expense raises an important question in the related case concerning income taxes related to the sale of the insolvent debtors' property about the rationale for the court's conclusion, citing *In re Holywell Corp.*, 68 B.R. 134, 137 (Bkrtcy. S.D. Fla. 1986)²⁶, that the United States could

²⁵ See *In re South Atlantic Financial Corp.*, 814 F.2d 814, 817 (11th Cir. 1985); *In re International Horizons*, 751 F.2d 1213 (11th Cir. 1985).

²⁶ The district court affirmed the bankruptcy court's order that the untimely filed claims of the United States for *prepetition* taxes could not provide a basis for participation and

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not "recover [payment] under section 503 for income taxes because it failed to file its claim in a timely fashion," App. 22.

Although Section 502(b)(3) prohibits a bankruptcy court from allowing payment of a claim for property taxes to the extent that such a claim exceeds the value of the estate's interest in such property, and it is undisputed that MCLP's assets were insufficient to pay all of its liabilities, allowing the liquidating trustee to avoid the fixing of statutory liens *prior* to the closing of the case, see Section 545(1)(D), the Eleventh Circuit has concluded that "the allegation concerning the propriety of the bankruptcy court's approval of a [liquidating] plan which makes no express provision for income taxes is an attempt to alter or modify the Plan and is therefore barred." App. 20 and 21.

Thus, the Eleventh Circuit has held that its Mootness Standard based upon "the need for finality requires that we decline to address the merits of [this] allegation[s] which seek[s] to challenge the court approved plan," App. 21, while approving the depletion of the debtors' estate for the payment of disputed real property taxes for which a timely proof of claim or an application for the payment of administrative expenses was not made.

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distribution in Holywell's estate based upon the following analysis:

"Admittedly, the proof of claim need not be 'letter perfect' so long as it 'apprise[s] the court of the existence, nature, and amount of the claim.' *In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (11th Cir. 1985), cert. denied, *Biscayne 21 Condominium Inc. v. South Atlantic Financial Corp.*, 475 U.S. 1015 (1986). . . ."

III. A Bankruptcy Court Lacks The Authority To Exercise Subject Matter Jurisdiction, Anticipating And Disposing Of Questions Pending And Not Ruled Upon In Lawsuits Filed In State Court Prior To The Date Of Commencement Of Proceedings In A Case Under Title 11.

The threshold issue is whether the bankruptcy court had authority to exercise subject matter jurisdiction for the purpose of resolving controversies concerning disputed real property taxes which had attached in suits pending before the Eleventh Judicial Circuit for Dade County prior to the filing date or from which the bankruptcy court had abstained and yielded jurisdiction to the State court's judgment in the interest of comity. The first question before the Eleventh Circuit was whether the courts below had authority to exercise jurisdiction to approve the proposed amended settlement disposing of the issues pending in State court prior to the filing date. See *Mansfield, Coldwater L.M.R. Co. v. Swan*, 111 U.S. 379, 383 (1884).

Although 11 U.S.C. Section 1123(b)(3) "provide[s] for (A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate," there is no such permissive provision in the Bank's plan with respect to the claims for tax refunds related to disputed real property taxes, and Article IV, *Means For Execution Of The Plan*, states only, in relevant part, as follows:

"The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash [the net proceeds of the sale of the Miami Center] the real estate taxes for 1983 and 1984, and pay the debtors' pro rata portion of the real estate taxes for 1985. . . ."

In *Peck, et al. v. Jenness, et al.*, 7 How. 612, 625 (1849), this Court held as follows:

"It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and

whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, *where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.*" (Emphasis added)

In *Peck* it was concluded that the district court had exclusive jurisdiction "of all suits and proceedings in bankruptcy," but that the suit pending before New Hampshire's Court of Common Pleas was not a suit or proceeding in bankruptcy. In the present case, as in *Peck*, the district court has no supervisory power over the Eleventh Judicial Circuit for Dade County, and thus, a bankruptcy judge, by reference, cannot exercise jurisdiction to approve a settlement disposing of issues which had attached in State court prior to the filing date, *without the consent of the litigants*, unless such jurisdiction has been conferred by the Bankruptcy Code.

As in *Peck*, the Petitioners "cannot discover any provisions in that [bankruptcy] act which limits the jurisdiction of the State courts, or confers any power on the bankruptcy court, to supersede their jurisdiction, to annul or anticipate their judgments. . . ." *Id.* at 625. In fact, the "Abstention Doctrine," imposes a mandatory duty on a court in a bankruptcy proceeding to abstain, in a case, 28 U.S.C. Section 1334(c)(2),²⁷ involving "a right

²⁷ 28 U.S.C. Section 1334(c)(2) provides, in relevant part, as follows:

"Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the *district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.*" [Emphasis added]

created by state law, a right independent and antecedent of the reorganization petition that conferred jurisdiction upon the bankruptcy court." *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2878 (1982). The petitioners' claims for tax refunds in the state court represent a right created by state law, independent and antecedent of the filing date.

The district court misconstrued the facts in the present case in applying *Florida Trailer's* principles for the conclusion that the liquidating trustee has the right and power, App. 41, "to settle subject to court approval . . . controversies and not merely those involved in pending suits." 284 F.2d at 569. *Florida Trailer* was a controversy started as a formal application by a trustee appointed in accordance with the bankruptcy act's requirements and granted statutory authority to "compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

In the present case, the causes of action that the liquidating trustee proposed to settle are pending in State court; the liquidating trustee is not a party in the lawsuits pending in State court; and, according to the Eleventh Circuit, the individual appointed and designated as Trustee of the Miami Center Liquidating Trust is not a "bankruptcy trustee."²⁸

²⁸ Compare the liquidating trustee's power to compromise the debtors' claims with the Eleventh Circuit's conclusion, granting relief to the liquidating trustee from the payment of income taxes on the debtors' behalf, that "the liquidating trustee is not a trustee under title 11, but rather a contract trustee performing limited and essentially ministerial duties," App. 26, and that "the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the plan makes him similar to a disbursing agent rather than an assignee or fiduciary." In the present case the liquidating trustee has exercised "the power to settle litigation in which the debtors are involved and to waive rights on behalf of the debtors," App. 29, claiming to be the "real party in interest."

Although State law provides that a statutory lien for taxes is superior to all other liens on the property against which the taxes have been assessed, Fla. Stat. 167.122, Chief Bankruptcy Judge Thomas C. Britton (now deceased) "expressed his understanding that the issue of the amount owed on the [County's] tax, not necessarily the amount paid from the estate . . . are two separate questions – there may well not be enough money after the payment of all administrative expenses to satisfy this lien." *Miami Center Liquidating Trust, acting for itself and on behalf of City National Bank, as Trustee, etc. v. Dade County, Fla.*, 75 B.R. 61, 63 (S.D. Fla. 1987).

Notwithstanding the district court's adoption of the bankruptcy court's findings concerning the taxpayer's burden of proof in the State court actions alleging that the assessed valuations on the Miami Center were discriminatory, subjecting the taxpayer to taxes not imposed on comparable property, this Court has held that the fact that a given taxpayer's property is assessed at its actual value is no defense to an "Equal Protection" challenge to the lower assessment of comparable property. *Hillsborough v. Cromwell*, 326 U.S. 620 (1946); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931); and *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923). In *Southern Railway Co. v. Watts*, 260 U.S. 519, 526 (1923), Justice Brandeis noted that:

"The rule is well settled that a taxpayer, although assessed at no more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others."

In *Sioux City Bridge Co.*, *supra* at 446, Chief Justice Taft stated:

"This Court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from

the requirement of statute.²⁹ The conclusion is based on the principle that where it is impossible to secure both the standard of true value, and the uniformity and equality required by law, the latter requirement is to be preferred. . . . "

In *Southern Bell Telephone & Telegraph Co. v. County of Dade*, 275 So.2d 4 (Fla. 1973), the Florida Supreme Court, having ruled that a taxpayer is constitutionally entitled to recover overpayment where its assessment level is above the median level of others, held as follows:

"The price at which property is sold as indicated by documentary stamps on the instrument is *prima facie* evidence of its value." 275 So.2d at 9.³⁰

The law imposes a duty on the Property Appraiser to exercise good faith and sound judgment in arriving at valuations of all property so that equality and uniformity may result. *Sanders v. Crapps*, 45 So.2d 485 (Fla. 1954).

In *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 109 S.Ct. 633 (1988), this Court has held that "Welcome Stranger" assessment practices violate the Equal Protection Clause. The Court's opinion held that assessments of real property based upon fair market value, as represented by a recent purchase price, violate the Equal Protection Clause when such assessment practices result in a gross disparity in assessed value with

²⁹ In 1984, the hotel's assessed value was \$95,844,000, or \$148,826 per room. The comparable assessed value of other properties was \$31,564 per room for the Hyatt, \$61,319 per room for the Marriott, and \$61,567 per room for the Omni. The Court should note that the Dade County Property Appraiser reduced the hotel's assessed value to \$59,500,000 as of January 1, 1989, or \$92,391 per room.

³⁰ The Dade County Property Appraiser assessed the value of the land purchased from St. Joe Paper for \$18,373,024 for 1979, although the price at which the property was sold was \$17 million. The land's assessed value in 1984 was \$36,586,250, an increase of 115.2%.

comparable property, and, quoting *Charleston Fed. Savings & Loan Ass'n. v. Alderson*, 324 U.S. 182, 190 (1945), that:

"The Equal Protection Clause 'applies only to taxation which in fact bears unequally on persons or property of the same class' [and also the Court noted that] in the rate-making context, '[i]t is not theory but the impact . . . that counts.' quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)." ³¹ 109 S.Ct. at 637-638.

The bankruptcy statutes and rules expressly precluded the bankruptcy court from exercising subject matter jurisdiction *after* confirmation of the plan to anticipate and dispose of questions concerning the Dade County Tax Collector's assessment practices in violation of the Equal Protection Clause and to impose upon the debtors' estates the obligation for the payment of the real property taxes.

The effect of discharge upon a bankruptcy court's authority to exercise postconfirmation jurisdiction is specified in 11 U.S.C. Section 1141. Section 1141(c) provides, in relevant part, that "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors. . . ." Section 1141(d)(1) provides, in relevant part, that "Except as otherwise provided in the plan . . . or in the order confirming the plan, the confirmation of a plan (A) discharges the debtor from any debt that arose before the date of such confirmation and any debt of a kind specified in Section 502(i) whether or not (i) a proof of claim based on such debt is filed . . . ; or (iii) the holder of such claim has accepted the plan. . . ."

³¹ Compare this Court's uniform precedent with the district court's reliance upon *Deltona Corporation v. Bailey*, 336 So.2d 1163, 1168 (Fla. 1976): "plaintiff whose property is assessed at fair market value must prove that 'his property is assessed at a percentage of value substantially higher than the percentage at which *all* other property in the county is generally assessed.'" [original emphasis]

IV. A Bankruptcy Court Lacks The Authority To Deny A Debtor's Vested Legal Right In Accordance With 11 U.S.C. Section 506(c) To Recover Money Expended To Dispose Of Property Free And Clear Of Statutory Liens To The Extent Of The Benefit To The Holder Of The Secured Claim.

Notwithstanding that Article IV, *Means For Execution Of The Plan*, provides that "title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all . . . liens . . . affecting Miami Center," the liquidating trustee's obligation was a condition precedent to the Purchaser's obligation in accordance with the Contract of Sale.

The Contract of Sale's paragraph 9, *Remedies of Purchaser*, provided that in the event the conditions precedent to the Purchaser's obligation were not satisfied, the Purchaser was granted the right, to be exercised not later than the Miami Center Closing Date, "either to (i) proceed to the closing or (ii) cancel this Agreement." The Purchaser closed on October 10, 1985, and has conceded that the liens on the property "became an obligation of the Purchaser when it acquired the Miami Center."

Paragraph 13 of the Amended Contract of Sale, entered into on October 10, 1985, provided, in relevant part, as follows:

"If Purchaser elects, in its sole discretion, to have Seller dismiss or settle any . . . tax protests, suits or claims, *Purchaser shall indemnify, defend and hold Seller harmless for and against any and all loss or damage Seller may incur as a result of any claims or actions that arise as a result of Seller discontinuing, dismissing or settling any such tax protests, suits or claims.*" [Emphasis added]

The approved settlement, negotiated among the defendants in this proceeding without any participation by the plaintiffs, dismissing the plaintiffs' complaint and prayer for relief which sought a ruling that the Bank is liable, and that the debtors are entitled to recover any funds

paid to discharge Dade County's liens and to pay real property taxes as an administrative expense, is in direct conflict with the liability imposed upon the Bank by the indemnity letter and the Third Circuit's opinion in *Equibank, supra*.

The controlling law in this case is 11 U.S.C. Section 506(c), and the Eleventh Circuit's affirmance of the bankruptcy court's approval of the settlement, denying the plaintiffs the relief requested in the Bill of Complaint, raises a question about the right of a debtor, as the Third Circuit held in *Equibank*, to recover money expended for the payment of real property taxes as administrative expenses of the estate, from a secured creditor to the degree that it received a benefit from disposing of the property securing its collateral free and clear of liens.

In the present case, the liquidating trustee sold the Miami Center pursuant to the amended consolidated plan of reorganization. If the Dade Tax Collector had timely filed proofs of claim and an application for payment of administrative expense, the administration of the bankruptcy laws would have required the same conclusion as the Third Circuit's analysis: (1) The assessed property taxes for 1982 and 1983 would have had a *seventh* priority in accordance with Section 507(a)(7)(B); (2) The assessed property taxes for 1984 and 1985 would have been payable as administrative expense under Section 503; and (3) The debtors would have been entitled to recover from the property any money expended to dispose of such property securing the Bank's "undersecured" Class 2 claim to the extent of its benefit as the holder of a secured claim, 11 U.S.C. Section 506(c), and, thus, discharge of Dade County's statutory liens is payable by the Bank as the secured creditor.

The Third Circuit's conclusion in *Equibank* was as follows:

"Taxes not secured by liens may also be payable by the secured creditor under section 506. Section 506(c) provides that '[t]he trustee may recover from property securing an allowed

secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim. 11 U.S.C. Section 506(c). Section 506 thus mandates a two-step inquiry: (1) it must be determined whether the taxes are reasonable, necessary costs and expenses of preserving or disposing of the property and (2) whether they benefit the secured creditors. . . ."

884 F.2d at 84.

If the debtor's right to recover money spent to dispose of a secured creditor's collateral is a vested legal right in accordance with Section 506(c), then it is the Court's obligation to protect the debtor's right to recover these funds as a source of payment of liabilities with a superior interest in the property to the Dade County Tax Collector's unfiled claims, specifically the payment of federal income taxes.

CONCLUSION

For the foregoing reasons, Petitioners Chopin Associates and Miami Center Limited Partnership, acting by Theodore B. Gould and Miami Center Corporation, their partners, respectfully request that this Court grant the writ and address the question of (1) the application of the Fair and Equitable Doctrine in the Abuse of Discretion standard of review, and (2) the resolution of the conflict among the circuits in the construction of 11 U.S.C. Section 506(c).

Respectfully submitted,

CHOPIN ASSOCIATES
and MIAMI CENTER
LIMITED PARTNERSHIP

ROBERT M. MUSSelman
413 Seventh Street N.E.
Charlottesville, VA 22901
(804) 977-4500

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APPENDIX A

EXHIBIT A

This Agreement made this 10th day of January, 1979, by and between the St. Joe Paper Company, Seller, of Suite 803 Florida National Bank Building, Jacksonville, Florida, 32202, and Theodore B. Gould, Buyer, of Hickory Ridge Farm, Earlysville, Virginia 22936.

AGREEMENT

The parties hereto, in consideration of the mutual agreements contained herein, and in further consideration of the sums to be paid hereunder, agree as follows:

1. Seller shall sell and Buyer shall buy the following property upon the terms and conditions set forth in this agreement:

Tract D, containing approximately 367,210 square feet, located in the City of Miami, Dade County, Florida (all as is more particularly shown on the plat attached hereto, made a part hereof and marked "Exhibit A").

2. The purchase price for Tract D is the sum of \$17,000,000. and shall be paid as follows:

A. \$500,000 ("the Initial Payment") upon the execution of this Agreement.

B. \$16,500,000 by certified check of Buyer at the closing.

3. Seller grants to Buyer an option to purchase Blocks 3 and 4 (as shown on Exhibit A) upon the following terms and conditions.

App. 2

A. Buyer shall obtain the option solely by purchasing Tract D under the terms of this Agreement. If Buyer so purchases Tract D, then, Subject to, and as amended by this paragraph, this Agreement shall become the contract for the Sale of Blocks 3 and 4.

B. Buyer may exercise the option at any time within 6 months following the closing of the purchase of Tract D. The closing date for the purchase of Blocks 3 and 4 shall be 6 months from the closing for the purchase of Tract D and shall take place at 10:00 A.M. on such date at the same offices as the closing for Tract D.

C. Buyer may extend the option for 2 consecutive periods of 6 months each after the initial 6 month option period. Each such extension shall be accomplished by Buyer making an additional payment in the sum of \$500,000. for each such extension on or before the date on which the option would otherwise terminate and such additional payment or payments to be credited toward purchase price in the event option is exercised. The closing date under each extension of the option shall be the last business day of each such extension period.

D. Buyer may exercise the option at any time it shall be in effect by written notice to Seller.

E. The purchase price for Blocks 3 and 4 is \$12,000,000.

F. The Seller agrees that if the Buyer wishes so to do that he may exercise this option (in the manner set forth above) by purchasing either Block 3 for \$7,000,000. or Block 4 for \$5,000,000. with the understanding that if he wishes to further extend the option to acquire the

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remaining Block he will continue to make \$500,000. payments for each additional option period all as set forth above.

4. The closing of the sale and purchase of Tract D under this Agreement shall take place at 10:00 A.M. on or before June 29, 1979, at the offices of Suite 803 Florida National Bank Building, Jacksonville, Florida 32202.

5. Seller represents that:

A. It is a corporation duly organized, validly existing and in good standing under the laws of the State of Florida and has the power and authority/ to own and sell the property pursuant to the terms of this Agreement.

B. It owns, has good and marketable title to the property, and will transfer the property free and clear of any liens or encumberances.

C. It has not dealt with any broker or middle man in connection with this transaction other than Raymond C. Brophy, Inc., Jacksonville Properties, Inc. and Oscar E. Dooly Associates, Inc. (the Brokers) and that it has agreed by separate Agreement to pay any and all brokerage commissions or other compensation due to the Brokers arising out of this transaction. This representation shall survive the closing of this Agreement.

D. There is no litigation or proceeding pending or threatened affecting Seller or the property except for the litigation initiated by the City of Miami in City of Miami v. St. Joe Paper Company, case Numbers 76-423 and 76-686.

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E. It will take no action which would impair its ability to convey the property to Buyer under the terms of this contract.

6. At closing Seller shall deliver to Buyer the following:

A. A Special Warranty Deed duly executed and acknowledged by Seller, in proper form for record.

B. At the Sellers expense, a Commitment from a Title Insurance Company acceptable to the Buyer to the effect that said Title Insurance Company will duly issue its Title Insurance Policy at the Buyers expense in a face amount equal to the purchase price insuring that the Buyer has good and marketable title to the property, subject to no exceptions. Said policy shall describe the property by metes and bounds in accordance with a survey to be obtained by the Buyer at his own expense.

7. The following shall be adjusted between Seller and Buyer and shall be prorated as of the closing date:

A. Real Estate taxes and assessments, and all other state, county and municipal taxes.

B. All utilities.

8. If Buyer shall fail to perform its obligation to purchase the property on the closing date in accordance with this Agreement, the sole remedy of Seller shall be to receive the initial payment and any further payments as liquidated damages in lieu of all other rights and remedies which might otherwise be available to Seller against Buyer.

9. Seller shall pay all taxes and fees relating to the transfer of the property, and all other costs in connection

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with this sale except Buyer's attorneys fees and premiums for the title insurance policy which will be paid for by the Buyer.

10. This Agreement may be assigned by Buyer however such Assignment shall not release Buyer from his obligations hereunder unless Seller agrees to such release.

11. Buyer will have reasonable access to the property and the right at his own cost and expense to make surveys, boring test, studies and the like provided that in so doing the existing tenants will not be unnecessarily disturbed.

12. In the event the property is condemned before the closing date, the Buyer shall have the right to pay the purchase price and receive the condemnation award.

Executed by Buyer on
January 10, 1979

WITNESSES

/s/ illegible

/s/ illegible

/s/ Theodore B. Gould (SEAL)
Theodore B. Gould

Executed by Seller on
January 10, 1979

WITNESSES:

/s/ illegible

/s/ illegible

ST. JOE PAPER COMPANY
By illegible (SEAL)

APPENDIX B
Special Warranty Deed

THIS INDENTURE, made this 27th day of March, A. D. 1980, between St. Joe Paper Company, a Florida Corporation with its principal office in Jacksonville, Duval County, Florida, party of the first part, and Chopin Associates, a Florida gneral [sic] partnership, of the County of Dade, in the State of Florida, and whose address is 1401 First Federal Building, 1 S.E. 3rd Ave. Miami, FL 33133, part y of the second part.

WITNESSETH: That the said party of the first part for and in consideration of the sum of Ten (\$10.00) Dollars, and other valuable considerations to it in hand paid by the part y of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold to the said part y of the second part, its heirs, and assigns forever, the following described land, lying and being in the County of Dade, and state of Florida, to-wit:

Being that portion of Tract D, Block 1, "duPont Plaza", according to the plat thereof as recorded in Plat Book 50, Page 11, of the Public Records of Dade County, Florida, more particularly described on attached Schedule A.

TOGETHER WITH all right, title and interest in and to any riparian and littoral rights incident thereto.

SUBJECT, however, to all taxes and assessments levied or assessed against the same subsequent to December 31, 1979; and SUBJECT also to: Restrictions, reservations and easements of record, if any. None of which is reimposed hereby.

THIS INSTRUMENT WAS PREPARED BY:

Donald G. Glascoff, Jr., Esq.
Cadwalader, Wickersham & Taft
One Wall Street
New York, NY 10005

[FIVE STATE OF FLORIDA;
DOCUMENTARY STAMP TAX Stamps
Omitted In Printing]

RETURN TO:

PIONEER NATIONAL TITLE
INSURANCE COMPANY
2600 Douglas Road, Suite 305
Coral Cables, Florida 33134

AND the said party of the first part does hereby specially warrant the title to said land, and will defend the same against the lawful claims of all persons claiming the same by, through, or under the party of the first part, but not otherwise.

IN WITNESS WHEREOF, the party of the first part has caused these presents to be executed in its corporate name by its Vice-President, attested by its Secretary and its corporate seal to be hereunto affixed, the day and year first above written.

[SEAL]

Signed, Sealed and Delivered in the Presence of:

By illegible
Its Vice-President

/s/ illegible Attest illegible
Its Secretary

/s/ illegible

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APPENDIX C

October 14, 1982

Miami Center Limited Partnership
300 Miami Center
100 Chopin Plaza
Miami, Florida 33131

Att: Mr. John F. Cable

Re: Miami Center/Phase I
100 Chopin Plaza
Office Building Only
"Shell and Core"
Permit No. 80-8903

Gentlemen:

We have inspected the Edward Ball Office Building as requested and have determined that the Life Safety Systems, Building Environmental Systems, Elevator Systems, Main Lobby and Exterior Enclosure are complete to the extent that the City of Miami has authorized a Shell & Core Permit under Building Permit No. 80-8903.

This authorization will allow you to have the public enter into the Main Lobby and to visit, conduct business, or occupy any office space for which a Certificate of Use has been issued.

A Temporary Certificate of Occupancy has been issued under the Shell & Core Permit and is conditional upon the completion of the exterior landscaping and various other minor punch-list items within the Building which must be finished within the next ninety (90) days.

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Furthermore, you agree not to allow any occupancy of office space for which construction plans have not been submitted and reviewed by the "City" and a Certificate of Occupancy has not been issued, and additionally you agree to indemnify and hold harmless the City of Miami with regard to any litigation which may arise as a result of this action.

Very truly yours,

/s/ Santiago Jorge-Ventura
Santiago Jorge-Ventura,
Architect
Building Official
Fire, Rescue & Inspection
Services Department

APPENDIX D

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

In re:) Case Nos.:
HOLYWELL CORPORATION, et al.,) 84-01590-BKC-TCB
) 84-01591-BKC-TCB
) 84-01592-BKC-TCB
Debtors.) 84-01593-BKC-TCB
) 84-01594-BKC-TCB
))
) Proceedings in
) Chapter 11

**ORDER ON DEBTORS' AMENDED EMERGENCY
MOTION FOR AUTHORIZATION TO ENTER
INTO SECURED LOAN AGREEMENT**

Miami Center Limited Partnership ("MCLP"), Theodore B. Gould ("Gould"), Miami Center Corporation ("MCC"), Holywell Corporation ("Holywell"), and Chopin Associates ("Chopin"), Debtors in Possession (collectively "Debtors") have moved this Court for an Order authorizing a loan from Holywell to MCLP pursuant to §364 of the Bankruptcy Code in the total principal amount of not more than \$3,000,000. The purpose of the proposed loan is to finance certain capital improvements to complete the Pavillon Hotel and the Edward Ball Office Building, to prepare space for tenants in the Pavillon Hotel and Edward Ball Office Building, and to pay utility deposits for service rendered and to be rendered to MCLP subsequent to the date MCLP filed its petition for reorganization.

Debtors attached to their Motion a schedule of the work to be performed and the estimated cost of performing this work. This schedule is attached hereto as Exhibit "A". In addition to the work scheduled in Exhibit "A", Debtors wish to prepare for leasing to Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey ("Finley Kumble") two floors in the Edward Ball Office Building at a cost not to exceed \$650,000. Finally, MCLP is required to make deposits to utility companies for post-filing services not to exceed \$175,000.

The attorneys for the Creditors' Committees for Holywell, MCLP and MCC were present at the hearings, as was the Bank of New York ("BNY"). Counsel in their arguments did not object to MCLP borrowing the necessary monies from Holywell; however, they did not agree as to what priority, if any, should be given to Holywell's proposed claim against MCLP. Based upon argument of the attorneys and the memoranda which have been filed, it is

ORDERED and ADJUDGED that:

1. Holywell Corporation may loan to Miami Center Limited Partnership an amount not to exceed three million dollars (\$3,000,000) to fund the following expenditures of Miami Center Limited Partnership: (a) the work necessary to complete and obtain a certificate of occupancy for the Pavillon Hotel and the Edward Ball Office Building, which work is scheduled in Exhibit "A" hereto; (b) the work necessary to prepare the space to be leased to Finley, Kumble, Wagner, Heine, Underberg, Manley & Casey not to exceed Six Hundred Fifty Thousand Dollars (\$650,000), and (c) deposits to utility companies for

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deposits as to post-filing services not to exceed One Hundred Seventy-Five Thousand Dollars (\$175,000).

2. The loan by Holywell Corporation to Miami Center Limited Partnership shall be secured by a lien on the assets of Miami Center Limited Partnership which shall be senior to the lien of all other creditors, except the lien of the Bank of New York, and shall have priority over the payment of any and all administrative expenses of Miami Center Limited Partnership.

3. These funds shall not be spent for purposes other than those stated above.

4. Debtor, Miami Center Limited Partnership, shall render an accounting monthly as to the expenditure of those funds to the Creditors' Committees of Holywell Corporation and Miami Center Limited Partnership, the Bank of New York, and attorneys of record in these proceedings.

DONE and ORDERED in Miami, Florida, this 9 day of January, 1985.

THOMAS C. BRITTON

Thomas C. Britton

U.S. Bankruptcy Judge

Copied to:

Fred H. Kent, Jr., Esq.
All Members of the Creditors' Committees
All Attorneys of Record

APPENDIX E

**In re HOLYWELL CORPORATION,
Debtor. (Two Cases)**

**Fred Stanton SMITH, as Trustee of the
Miami Center Liquidating Trust,
Plaintiff-Appellee,**

v.

**UNITED STATES of America, Holywell
Corporation, Miami Center Limited
Partnership, Miami Center Corporation,
Chopin Associates, Theodore B. Gould,
Defendants-Appellants,**

**Shuts & Bowen, Intervenor,
Bank of New York,
Defendant-Appellee.**

**Fred Stanton SMITH, as Trustee of the
Miami Center Liquidating Trust,
Plaintiff-Appellee,**

v.

**UNITED STATES of America,
Defendant,**

**Holywell Corporation, Miami Center
Limited Partnership, Miami Center
Corporation, Chopin Associates,
Theodore B. Gould,
Defendants-Appellants,**

**Shutts & Bowen, Intervenor,
Bank of New York,
Defendant-Appellee.**

No. 89-5862.

**United States Court of Appeals,
Eleventh Circuit,**

Sept. 18, 1990.

Liquidating trustee filed adversary proceeding in Chapter 11 cases and sought declaratory judgment concerning obligation to file income tax returns and pay taxes, if any, in connection with the sale of reconfirmation and postconfirmation properties. The Bankruptcy Court determined that the liquidating trustee was not responsible for filing or paying income taxes. Appeals were taken and consolidated. The United States District Court for the Southern District of Florida, Nos. 88-795-CIV-JWK and 88-1053-CIV-JWK, James W. Kehoe, J., ruled in favor of liquidating trustee. Appeal was taken. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) allegation that the Bankruptcy Court lacked authority to confirm plan had to be dismissed as moot; (2) allegation that creditor acted fraudulently in obtaining approval of the plan had to be dismissed as moot; and (3) liquidating trustee was not required to file income tax returns or pay taxes under terms of the plan or under provisions of the Internal Revenue Code.

Affirmed.

Cox, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this bankruptcy case, we affirm the district court's ruling that a liquidating trustee was not required by the

provisions of a confirmed amended Plan of Reorganization ("Plan") nor by statutory provisions to file tax returns and pay income taxes on the sale of pre-confirmation and post-confirmation properties.

FACTS

Miami Center Limited Partnership ("MCLP"), a Florida limited partnership, obtained a construction mortgage from the Bank of New York ("BNY") to develop the "Miami Center," an office building and hotel complex in Miami, Florida. Following default on the mortgage, MCLP, Holywell Corporation, Chopin Associates, Theodore Gould, Miami Center Corporation, and other "insiders" (hereinafter collectively referred to as the "debtors") as defined in 11 U.S.C. § 101(30)(C) (West Supp.1990) each filed a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978.¹

Both BNY and the debtors submitted competing plans of reorganization and accompanying disclosure statements to the bankruptcy court. The Internal Revenue Service ("IRS"), a creditor, received copies of the plans and disclosure statements and also received notice of all scheduled hearings before the bankruptcy court. On

¹ Theodore B. Gould, a debtor, owned 100 percent of the stock of Holywell Corporation (debtor), and also served as president and director of Holywell. Holywell Corporation owned 100 percent of the stock of Miami Center Corporation ("MCC") (debtor), and Gould served as president and director of MCC. Gould and MCC were the sole general partners of Chopin Associates (debtor) and of Miami Center Limited Partnership (debtor).

October 10, 1985, following overwhelming approval by the creditors, the bankruptcy court confirmed BNY's amended Plan of Reorganization. The district court affirmed the confirmation order. *See Holywell Corporation v. Bank of New York*, 59 B.R. 340 (S.D.Fla.1986). This court subsequently dismissed, as moot, the debtors' appeal of the confirmation order because the Plan was substantially consummated and no effective relief could be fashioned. *See Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), cert. denied, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

The Plan required consolidation of the debtors' estates, establishment of a liquidating trust, and appointment of a liquidating trustee.² The Plan was funded by all the debtors' assets, as defined in section 541(a) of the Bankruptcy Code, including proceeds from the pre-confirmation sale of certain of Holywell Corporation's properties (hereinafter the "Washington properties") and the anticipated post-confirmation sale of the Miami Center property. The Plan had no express provision requiring the liquidating trustee to either file tax returns or pay income taxes.

² The parties refer to the trustee created pursuant to the Plan as the "liquidating trustee." Article V of the Plan provides that "[a] Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court . . . is designated as Trustee of all property of the estates of the Debtors." The trustee's responsibilities include the identification and payment of all valid claims against the estate with payment of the sum remaining to the debtors. On August 12, 1985, a United States Bankruptcy Court judge appointed Fred Stanton Smith trustee of the estate.

The corporate debtors did not file a tax return concerning the sale of pre-confirmation properties until January 4, 1988, although any gain would have been realized during the fiscal year ending July 31, 1985.³ At that time they requested the liquidating trustee to pay the taxes owed. Neither the corporate debtor nor the liquidating trustee filed a tax return for the fiscal year ending July 31, 1986, which would have included gains realized from the sale of the Miami Center property.

PROCEDURAL HISTORY

The liquidating trustee filed an adversary proceeding in the United States Bankruptcy Court in December, 1987, naming the United States, BNY, and the debtors as defendants. The liquidating trustee sought a declaratory judgment concerning the obligation to file income tax returns and pay taxes, if any, in connection with the sale of the Washington properties and the Miami Center. On April 28, 1988, the bankruptcy court entered final judgment declaring that the liquidating trustee was not responsible for filing or paying income taxes.

Following entry of final judgment, both the United States and the debtors filed notices of appeal. After consolidating the appeals, the district court granted the debtors' emergency motion to stay the final judgment of

³ Shortly after the complaint was filed, Holywell Corporation mailed a consolidated federal income tax return for the fiscal year ending July 31, 1985, to the Internal Revenue Service. The return showed a liability for taxes, interest, and penalties totalling \$264,309. Holywell simultaneously demanded that the trustee pay that amount.

the bankruptcy court. The court also granted the motion of a law firm, Shutts and Bowen, special counsel to the liquidating trustee, to intervene in the consolidated appeal for the purpose of seeking a lift of the stay in order to obtain payment of \$917,000 in attorney fees.

BNY moved to dismiss the appeal, as moot, and the liquidating trustee moved for authorization to consummate the settlement with Dade County of *ad valorem* tax claims.

In July, 1989, the district court granted in part, and denied in part, the BNY's motion to dismiss. The court dismissed the appeal to the extent that the debtors sought to challenge the Plan based on allegations that BNY, through its plan of reorganization, attempted to defraud the government of income taxes. The district court denied the motion to the extent that the government and the debtors sought to enforce provisions of the Plan which they contended provided for the payment of income taxes. Additionally, the district court vacated its earlier stay of the bankruptcy court's final judgment.

CONTENTIONS

The government and the debtors contend that this court has jurisdiction to decide whether the liquidating trustee is responsible for filing income tax returns and paying income taxes in connection with the sale of properties. Insofar as the merits of the complaint are concerned, they contend that under certain provisions of the Plan, the liquidating trustee was obligated to file and pay income taxes. Additionally, they contend that certain statutory provisions of the Income Tax Code require that the

liquidating trustee file and pay taxes. Moreover, they contend that once that obligation arises, the grantor trust provisions of the Internal Revenue Code do not relieve the liquidating trustee of that duty.

The liquidating trustee contends that this court lacks jurisdiction to hear this appeal because the allegations constitute a substantial modification of the Plan. Addressing the merits, the liquidating trustee contends that the debtors were required to file tax returns and pay taxes, if any, relating to the sale of pre-confirmation and post-confirmation properties.

ISSUES

We address the following issues: (1) whether this appeal is moot; (2) whether the provisions of the Plan require that the liquidating trustee pay all applicable income taxes on the sale of the pre-confirmation and post-confirmation properties; and (3) whether the income tax laws require that the liquidating trustee pay all applicable income taxes.

DISCUSSION

A. *Mootness*

The government and the debtors contend that we have jurisdiction to decide this case despite our earlier decision dismissing their appeal of the district court's confirmation of the Plan. According to the government and the debtors, we have jurisdiction to decide whether the liquidating trustee failed to discharge his duties in

accordance with the terms of the Plan. Further, they contend that we have jurisdiction to redress BNY's fraudulent act of submitting a plan of reorganization which failed to disclose the absence of any provision relating to the payment of income taxes.

The mootness doctrine, as applied in a bankruptcy proceeding, permits the courts to dismiss an appeal based on its lack of power to rescind certain transactions. *See Markstein v. Massey Associates Ltd.*, 763 F.2d 1325 (11th Cir.1985); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir.1981); *Miami Center Limited Partnership*, 838 F.2d 1547. The mootness standard "is premised upon considerations of finality . . . and the court's inability to rescind . . . and grant relief on appeal." *Miami Center Limited Partnership*, 838 F.2d at 1553 (quoting *In re Sewanee Land Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984)). In dismissing the debtors' previous challenge, this court was guided by "the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained." *Miami Center Limited Partnership*, 838 F.2d at 1555. Mindful of that policy, we will not entertain any challenge to the Plan which seeks to modify or amend its provisions.

The district court is correct in its ruling that the allegation of fraud is an attempt to modify or alter the Plan and is therefore barred under the mootness doctrine. The allegation seeks to alter the Plan by challenging the terms and provisions which the bankruptcy court and the district court approved. We also conclude that the allegation concerning the propriety of the bankruptcy court's approval of a plan which makes no express provision for income taxes is an attempt to alter or modify the Plan and

is therefore barred. The need for finality requires that we decline to address the merits of these allegations which seek to challenge the court-approved Plan.

We reject the debtors' attempt to create an exception to the mootness doctrine based on the holding of *In re Seminole Park & Fairgrounds, Inc.*, 502 F.2d 1011 (5th Cir.1974). In *In re Seminole Park*, the court held that the allegation was not "a belated effort to alter or amend the plan." *In re Seminole Park*, 502 F.2d at 1014. In this case, however, we have concluded that the allegations seek to amend or modify the Plan. Thus, we find this case distinguishable from *In re Seminole Park*.

The allegation that certain provisions of the Plan and/or provisions of the Income Tax Code require the liquidating trustee to file and pay income taxes is not an attempt to modify or alter the Plan. The focus of this allegation is that the liquidating trustee failed to act in accordance with the court-approved Plan. Thus, we address the merits of this claim because it seeks to enforce existing provisions of the Plan. See *In re Seminole Park*, 502 F.2d 1011 (bankruptcy court has power to assure that court-approved plan is consummated in fact).

B. *Provisions of the Plan*

The Plan required that the liquidating trustee acquire the trust property and dispose of it in accordance with the terms of the Plan. As stated earlier, the Plan makes no express provision for payment of federal income taxes. Consequently, we must determine whether any of the provisions of the Plan can reasonably be interpreted as

requiring the liquidating trustee to file income tax returns and pay income taxes.

The government argues that Article I of the Plan permits it to recover income taxes as an administration claim. Article I of the Plan provides for the payment of actual and necessary expenses of preserving the bankrupt estate as administration claims. The Plan conditions payment, however, to claims for which a proof of claim has been filed or a liability scheduled by the debtor. Since the IRS never filed a proof of claim for taxes and the debtors never scheduled such taxes as a liability, such a claim cannot qualify as an administration claim.

The government and the debtors also assert that section 503 of the Bankruptcy Code obligates the liquidating trustee to pay income taxes. Title 11 U.S.C. § 503 provides that "an entity may file a request for payment of an administrative expense after notice and hearing." It is generally accepted that taxes incurred by a bankrupt estate fall within the definition of administrative expenses. See *In re Lambdin*, 33 B.R. 11 (Bkrtcy. M.D.Tenn.1983). Pre-confirmation taxes are thus recoverable under this provision. In order to recover payment for administrative expenses, however, a claim must be filed in a timely fashion. *In re Holywell Corp.*, 68 B.R. 134, 137 (Bkrtcy.S.D.Fla.1986).

We conclude that the IRS cannot recover under section 503 for income taxes because it failed to file its claim in a timely fashion. The debtors filed for bankruptcy on August 22, 1984. The bankruptcy court established January 15, 1985, as the claim bar date. The IRS, despite having notice of the proceedings, filed no claim. In fact, it

was not until the liquidating trustee filed the declaratory judgment action in December, 1987, that the government seriously asserted a claim for income taxes. In an earlier proceeding in this case, the bankruptcy court held that claims filed by the IRS on October 16, 1985, and November 6, 1985, were time-barred. A similar conclusion is clearly appropriate in this case.

Post-confirmation taxes are not recoverable as administrative expenses under 11 U.S.C. § 503. In *United States v. Redmond*, 36 B.R. 932, 934 (Bkrtcy.D.C.Kan. 1984) the court was faced with a post-petition claim by the IRS for unpaid employment and unemployment taxes. The court rejected the IRS's claim that such taxes constituted administrative expenses under 11 U.S.C. § 503. The court stated that "upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new entity, and administration of the estate ceases. As such, the tax liability of the reorganized debtor was not incurred in administering the bankruptcy estate." *United States v. Redmond*, 36 B.R. at 934. As the court noted, post-confirmation tax is normally a liability of the debtor. See *Redmond*, 36 B.R. at 934.

We also reject the assertion that Article V of the Plan obligates the liquidating trustee to pay income taxes on the sale of post-petition properties. Article V, paragraph 6 provides:

All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the correctness of any and all costs, expenses and obligations, shall approve and direct the payment

thereof prior to a distribution to the holders of unsecured Allowed claims.

As stated above, administration of the estate ceases upon confirmation of a plan of reorganization. *See Redmond*, 36 B.R. at 934. Thus, taxes which accrue post-confirmation are not incurred in administering the Trust, and are not recoverable under Article V of the Plan.

Our conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes.

C. *Statutory Requirements*

The government and the debtors strenuously argue that 26 U.S.C. §§ 6012(b)(3), (4) and 6151 require, as a matter of law, that the liquidating trustee file and pay income taxes. Under those provisions, the "trustee in a case under title 11, or an assignee" and the fiduciary of an individual debtor's estate are responsible for filing of returns and paying of taxes owed by a corporate and individual debtors respectively.⁴

⁴ Title 26 U.S.C. § 6012(b)(3), (4) provides as follows:

(3) In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not each party or business is being operated, such receiver, trustee,

(Continued on following page)

The bankruptcy judge found that these provisions did not apply in this case. The bankruptcy judge concluded that because of the limited and essentially ministerial function assigned to the trustee by the Plan, he was a contract trustee rather than a trustee in a case under Title 11. Additionally the bankruptcy judge concluded that because of the liquidating trustee's non-discretionary duties to identify and pay allowed claims in accordance with the terms of the Plan, he was more akin to a disbursement agent than an assignee or fiduciary.

We reject the government's contention that the legislative history of 26 U.S.C. § 6012(b)(3) indicates that it was intended to apply to the trustee in this case. The government suggests that because the liquidating trustee was appointed by a court which acquired jurisdiction by virtue of 11 U.S.C. § 105, we should construe the liquidating trustee's appointment as that of a trustee under Title 11. Alternately, the government argues that the liquidating trustee is either an assignee, receiver, or fiduciary of the debtors and thus governed by the requirements of 26 U.S.C. § 6012.

(Continued from previous page)

or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) . . . Returns of an estate . . . of an individual under chapter . . . 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

Title 26 U.S.C. § 6151 provides, in pertinent part that:

(a) [w]hen a return of tax is referred under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed. . . .

Based on our review of the statutory provisions, we agree with the district court's conclusion that 26 U.S.C. § 6012 does not apply in this case. By its terms, section 6012 refers only to trustees who are appointed under Chapter 11 of the Bankruptcy Code. If Congress had intended that all trustees be subjected to the provisions of section 6012, it would have so provided. We also conclude that section 6012 was not intended to apply to a broad range of individuals without regard to the functions which they perform.

In deciding whether to extend the provisions of section 6012, we find *In re Allen Wood Steel Co.*, 7 B.R. 697 (Bkrtcy.E.D.Pa. 1980) instructive. In *In re Allen Wood Steel Co.*, the bankruptcy court refused to extend the provisions of section 6012 to a disbursing agent under facts similar to those in this case. We agree with the district court that section 6012 does not apply to the liquidating trustee, and rely on its analysis. First, we conclude that the liquidating trustee is not a trustee under Title 11, but rather a contract trustee performing limited and essentially ministerial duties. Second, we agree that the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather than an assignee or fiduciary.

CONCLUSION

We dismiss, as moot, the allegation that the bankruptcy court lacked authority to confirm the Plan, and the allegation that the Bank of New York acted fraudulently in obtaining approval of the Plan. We accept jurisdiction

to decide whether the liquidating trustee breached his duty either under the terms of the Plan or other statutory provisions. We hold, however, that neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes. Accordingly, we affirm the district court.

AFFIRMED

COX, Circuit Judge, dissenting:

I believe that under 26 U.S.C. § 6012(b)(3) and (4) and section 6151 the liquidating trustee is obligated both to file income tax returns and to pay taxes on behalf of the corporate debtors and the estate of the individual debtor. Contrary to the court's holding, I believe that section 6012(b)(3) applies to an individual, like the liquidating trustee in this case, who is appointed as a part of a confirmed plan of reorganization and who possesses title to substantially all the debtors' assets. I further conclude that given the broad powers granted to the liquidating trustee in Article V of the Plan, he qualifies as a "fiduciary" within the meaning of section 6012(b)(4).

The court holds that "section 6012 refers *only* to trustees who are *appointed under Chapter 11* of the Bankruptcy Code" (emphasis added). The court reasons that since the liquidating trustee was appointed to administer the Plan, he is a "contract trustee" as opposed to a trustee appointed under title 11. The plain language of section 6012(b)(3), however, makes its filing requirements applicable to a "trustee *in a case* under title 11 of the United States Code. . . ." (emphasis added). While it is not readily apparent from the face of the opinion, the court

seems to have equated the meaning of the phrase "a trustee in a case under title 11" with the Bankruptcy Code's definition of a trustee appointed under 11 U.S.C. § 1104(a) (1979).¹ This interpretation of section 6012(b)(3) is too restrictive and fails to comport with the broad wording of the statute. Section 6012(b)(3) is properly viewed as encompassing trustees of a corporate debtor who, like the liquidating trustee, are appointed to administer a reorganization plan in a bankruptcy case. It is not limited to just those trustees who are appointed under 11 U.S.C. § 1104 or section 702.

The legislative history of section 6012(b)(3) further indicates that Congress intended this section to reach a broad spectrum of persons acting in a fiduciary capacity for a corporation in bankruptcy. Committee reports suggest that the phrase "receiver, trustee in a case under title 11 of the United States Code, or assignee . . ." is to be read as encompassing "receivers or other fiduciaries." H.R. Rep. No. 1337, 83d Cong., 2d Sess. 3, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4017, 4543; and S. Rep. No. 1622, 83d Cong., 2d Sess. 3, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4621, 5211. Thus, section 6012(b)(3) anticipates any situation where substantially all the assets of a corporation are vested in a person

¹ 11 U.S.C. § 1104(a) (1979) in pertinent part reads:

At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee -

acting in a fiduciary capacity for the bankrupt corporation. Accordingly, the liquidating trustee, not the assetless corporate debtors, should be responsible for discharging tax obligations.

The court further holds that the liquidating trustee is more like a "disbursing agent" of the trust rather than a "fiduciary" of the individual debtor. Article V of the Plan vests the liquidating trustee with all right, title, and interest of the debtors in their estate property and empowers the trustee to administer the liquidation of that property pursuant to the Plan. The Plan authorizes the liquidating trustee not only to liquidate the debtors' property but also to manage the property "in all other ways as would be lawful for any person owning the same to deal therewith. . . ." Article V, paragraph 3. These broad powers include the power to lease, improve or encumber the property, the authority to sue and be sued, and the power to settle litigation in which the debtors are involved and to waive rights on behalf of the debtors.

The court's attempt to characterize the liquidating trustee as simply a disbursing agent denies the reality of his rights, duties and obligations under the Plan. A mere label does not magically transform the liquidating trustee into something he is not. In fact, his job description squarely fits within the Internal Revenue Code description of a "fiduciary."² Consequently, he is obligated under

² A "fiduciary" is defined broadly in § 7701(a)(6) of the Internal Revenue Code as "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity."

section 6012(b)(4) to file returns on behalf of the individual debtor.

The court nonetheless analogizes the facts of this case to those in *In re Alan Wood Steel Co.*, 7 B.R. 697 (Bankr.E.D.Pa. 1980), to support its conclusion that the liquidating trustee is a "disbursing agent" instead of an assignee or fiduciary of the debtors. However, *In re Alan Wood* is distinguishable from the present case. *In re Alan Wood* involved a disbursing agent under the former Bankruptcy Act.³ The disbursing agent in *In re Alan Wood* did not have possession of or hold title to the property of the debtors. Moreover, by statute he was only entitled to "distribute, subject to the control of the court, the consideration . . . deposited by the debtor." 7 B.R. at 701 (quoting 11 U.S.C. §§ 110, 743 and 737 (1976)). In this case, the liquidating trustee has possession of the debtors' property and is authorized to do more than simply distribute funds. Therefore, the liquidating trustee more closely approximates an assignee or fiduciary than a disbursing agent.

Since both section 6012(b)(3) and (4) apply to the liquidating trustee, he is obligated to file tax returns on behalf of the corporate debtors and the estate of the individual debtor. Necessarily, then, he is also responsible for the payment of those taxes under 26 U.S.C. § 6151. The court's decision to the contrary encroaches upon the IRS's ability to collect taxes successfully in

³ *In re Alan Wood Steel Co.* was decided under the old Bankruptcy Act which provided for the appointment of bankruptcy trustees under § 44(a), receivers under § 332, and disbursing agents under § 337(a). A disbursing agent is a statutorily distinct entity.

situations where a reorganization plan provides for the appointment of a trustee to take possession of substantially all the debtors' assets and to administer the Plan. Although the court encourages us to take consolation in the fact that the government may seek collection of the tax monies from the reorganized debtor, it remains unclear from where that money will come.

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APPENDIX F
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5759

D. C. Docket No. 89-70-CIV-CCA

IN RE: HOLYWELL CORPORATION,

Debtor.

CHOPIN ASSOCIATES, Acting by
Theodore B. Gould, MIAMI CENTER
CORPORATION, MIAMI CENTER LIMITED
PARTNERSHIP, Acting by Theodore
B. Gould,

Plaintiffs-Appellants,
versus

FRED STANTON SMITH, Trustee, BANK
OF NEW YORK, CITY NATIONAL BANK OF
MIAMI, DADE COUNTY, FLORIDA, JOEL
ROBBINS and FRED GANZ,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(August 14, 1990)

Before TJOFLAT, Chief Judge, FAY, Circuit Judge, and
HOFFMAN*, Senior District Judge.

*Honorable Walter E. Hoffman, Senior U. S. District Judge for
the Eastern District of Virginia, sitting by designation.

PER CURIAM:

The bankruptcy court had the authority to consider the settlement reached between the trustee and Dade County concerning questions surrounding outstanding ad valorem real property taxes and did not abuse its discretion in approving the settlement.

AFFIRMED.

APPENDIX G

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

In re:

**HOLYWELL CORPORATION,
et al.,**

**Case No. 89-0070-
Civ-Atkins**

Debtors.

**CHOPIN ASSOCIATES, acting by
THEODORE B. GOULD, et al.,**

Appellants,

vs.

**FRED STANTON SMITH, as
Trustee of THE MIAMI CENTER
LIQUIDATING TRUST, et al.,**

Appellees.

**Order Affirming Bankruptcy Court's Order Approving
Amended Settlement of Ad Valorem Tax Claims.**

This cause is before the court on the debtors' appeal from the bankruptcy court's order, dated November 18, 1989 (the "Order"), approving an amended settlement of outstanding and potential tax disputes between Dade County Taxing Authorities and the Liquidating Trustee of the Miami Center Liquidating Trust. A hearing on the appeal was held before this court on April 25, 1989. Now, upon consideration of the responsive briefs, the hearing, and the relevant case law and rules, it is

**ORDERED AND ADJUDGED that the order is
AFFIRMED.**

Background Information.

This appeal arises out of the bankruptcy's [sic] court's approval of a settlement reached between the appellees Dade County Taxing Authority ("Dade County") and Fred Stanton Smith, Liquidating Trustee of the Miami Center Liquidating Trust (the "Liquidating Trustee"). Veterans of *Holywell* litigation will, in the present order, have to content themselves with a pared-down version of the facts; the uninitiated should consult earlier opinions for a more complete factual panorama.

In August, 1984, the debtors filed simultaneous Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of Florida.¹ The amended reorganization plan (the "plan") was confirmed one year later, and the plan, by its terms, created the Miami Center Liquidating Trust (the "trust"). The plan further provided for the appointment of a liquidating trustee and required the trustee to sell the subject property to the appellee Bank of New York (the "Bank") or its nominee. The property was sold to the Bank's nominee, City National Bank ("City National"), on October 10, 1985.

From 1982 until the present, certain ad valorem taxes on the subject property were not fully paid. The parties were aware of this when the property was sold in 1985. The confirmation plan therefore required the liquidating

¹ The debtors are Theodore Gould, Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, and Chopin Associates.

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trustee, at the 1985 closing, to escrow part of the property's purchase price to cover any outstanding ad valorem taxes. This escrow fund now contains approximately \$8.5 million.

Shortly after the 1985 sale, Dade County attempted to settle with the trust matters pertaining to the ad valorem taxes allegedly due against the subject property. The first round of settlement negotiations failed, but the liquidating trustee, in March, 1988, filed a motion in bankruptcy court for an order authorizing a compromise of all outstanding ad valorem taxes against the property from 1979 through 1985. Under the proposed settlement, the trust would pay Dade County \$3,430,754.34 in ad valorem taxes for the period running from 1979 through 1984. Additionally, the Bank would return to the trust a repossessed sum assessed against the trust at the consummation of the 1985 sale. The settlement further required the trust to waive certain claims against Dade County for alleged overpayments of taxes, in exchange for which the County waived or favorably adjusted numerous assessments against the trust. *See Order*, at 5. With the exception of the appellants, who continued to maintain that the County did not hold valid tax liens, the affected parties agreed to the proposal.

The merits of the proposal were scrutinized at a two-day evidentiary hearing conducted by the bankruptcy court in April, 1988. The parties submitted to the bankruptcy court written memoranda in support of their respective positions. The bankruptcy court concluded that the proposal was fair, but the court refused to issue its approval until the parties struck from the proposal the post-petition interest payment that was to have been

assessed against the trust. See Order, at 7-8. The provision was deleted, and the bankruptcy court, after yet another hearing, finally approved the proposal on November 18, 1988. In so doing, the bankruptcy court also dismissed the related adversary proceeding filed by the appellants. This appeal followed.

Discussion.

The former Fifth Circuit case of *In re Matter of Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980), furnishes the touchstone for the present inquiry. The *Jackson* court explained that the bankruptcy court, before it approves a settlement, must scrutinize the facts of its case with sufficient detail to determine:

- (1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law,
- (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
- (3) All other factors bearing on the wisdom of the compromise.

Id. at 607 (relying on *Protective Committee for Independent Stockholder of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). The purpose of such a test is to ensure that the bankruptcy court has before it sufficient facts to permit an informed, independent evaluation of the proposal. *Matter of AWECO, Inc.*, 725 F.2d 293, 299 (5th Cir. 1984); see also *In Re American Reserve Corp.*, 841 F.2d 159, 162 (7th Cir. 1987) (bankruptcy court cannot merely "rubber stamp" the settlement proposal).

The reviewing court's primary duty is to determine whether the compromise approved by the bankruptcy court is "fair, equitable, and in the best interest of the estate." *Jackson*, 624 F.2d at 608; see also *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986) (reviewing court must determine whether the settlement is reasonable on the facts of the case). To discharge this duty, the reviewing court must determine, first, that there existed a "substantial factual basis for the compromise" and, second, that the bankruptcy court has drawn "articulate findings and conclusions" from that factual basis. *Jackson*, 624 F.2d at 608. If this test is passed, the reviewing court "may not reverse absent some other abuse . . . of . . . discretion." *Id.* (relying on *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960)). When conducting this inquiry, the reviewing court must, of course, uphold factual findings that are not clearly erroneous, see Fed. R. Civ. P. 52, and it must always bear in mind that public policy favors settlement over protracted, costly litigation.

Applying these principles to the facts of the present case, the court concludes that the bankruptcy court's ruling should be affirmed. The bankruptcy court conducted a searching *Jackson* inquiry, and it approved the proposal only after the proceedings yielded a welter of evidence bearing on the propriety of settlement. For example, both A. H. Blake, a former tax assessor, and the liquidating trustee, an experienced real estate broker, testified that the proposed settlement resolved tax matters very favorably for the trust. Order, at 3-4. Several reduced valuations undertaken by Dade County for settlement purposes also conferred large tax breaks upon

the trust. *See id.* at 5-6 (discussing procedures which "adjust[] the assessments very considerably in favor of the liquidating trust"). The bankruptcy court also observed that the Bank's reparation of funds received from the trust in October, 1985, would return to the trust an additional \$400,000 to \$500,000. *Id.* at 7. The net result is that the payments due under the proposal will consume less than half the money in the escrow account, thereby conferring substantial savings upon the trust.²

Against these and many other benefits, the bankruptcy court balanced the detriments which the appellants claimed would attend the proposed settlement. *See Order*, at 9-10. The bankruptcy court was aware that the appellees had, for years, been involved in state court litigation which challenged the County's ad valorem tax assessments. The court nevertheless believed that these proffered detriments were outweighed by the benefits attending settlement – the court observed that the issues raised by the state court litigation were complex, that the outcome of the litigation was, at best, uncertain, and that the litigation itself was extremely expensive. *Id.* at 3-4 & 10. The bankruptcy court therefore concluded that the settlement would insure to the best interests of the estate. This conclusion finds ample support in the record, and the court, at this juncture, perceives no reason to disturb it.

² The appellants do not dispute that "[a]ny savings realized upon a successful resolution of the property tax litigation would be payable into the Miami Center Liquidating Trust for the benefit of the remaining creditors." Answer Brief of Appellees Bank of New York, et al., at 3.

The appellants, however, advance a number of arguments to the contrary. The appellants argue, *inter alia*, that Dade County's failure to file proofs of claims precludes the County from enforcing any ad valorem tax liens against the property; that various sections of the Bankruptcy Code further bar the County's claims; and that the County's assessments violate the Equal Protection Clause of the Fourteenth Amendment. The appellants also argue that the bankruptcy court lacked jurisdiction to approve the proposed settlement because such approval compromised the claims of non-party St. Joe Paper Company. They also argue that the bankruptcy court committed a host of errors pertaining to interest payments. Although the exact thrust of this outpouring is unclear, the appellants appear to believe that the bankruptcy court committed various legal errors and that these errors, viewed separately or in the aggregate, warrant reversal.

The appellants misunderstand the nature of the present inquiry. Legal arguments advanced by a settlement dissenter must, at the review stage, be assessed not in a vacuum but, rather, with reference to the overarching principles delineated in *Jackson*. That is to say, the district court does not conduct a "mini-trial" on the merits of each claim purportedly compromised by a bankruptcy settlement; rather, the district court determines only whether the bankruptcy court, by compromising those claims, abused its discretion and approved a settlement which was not fair, reasonable, or in the best interests of the estate. See *In re Blair*, 538 F.2d 849, 851-52 (9th Cir. 1976) (decision on whether there should be trial on merits of compromised claim is vouchsafed to sound discretion of bankruptcy court); *In re Hessinger Resources, LTD.*, 67

B.R. 378, 383 (C.D. Ill. 1986) (not necessary to conduct "mini-trial" on merits). A more expansive standard of review would ignore the clear mandate of *Jackson* and undermine sound public policy. See *Florida Trailer & Equipment Co.*, 284 F.2d at 574 (Policy favoring settlement would be undermined if reviewing court could disturb settlement which compromises potentially valid claim).

Viewed in this light, the court now turns to the more salient arguments advanced by the appellants.³ The appellants first argue that the County's failure to file proofs of claims prevents the County from enforcing liens against the property. This argument does not, however, warrant reversal. Bankruptcy Rule 3003(c)(2) prevents certain non-filing creditors from being treated as such for purposes of "voting or distribution"; but the Rule does not "prevent such a creditor from otherwise participating in the case." 8 *Collier on Bankruptcy* § 3003.05[3] & n.8 (15th ed. 1989) (emphasis added). It is therefore not clear whether Rule 3003(c)(2) bars Dade County's claims in the present case: the County's success or failure depends on whether receipt of settlement proceeds constitutes proscribed "distribution," or mere "participation in the case." At best, then, the appellants' argument raises a novel issue of law that has not been decided in this circuit – it hardly proves that the omnibus settlement was unfair, inequitable, or not in the estate's best interests. Compare *In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (11th

³ Although the court has reviewed all of the arguments advanced by the appellants, the court will, in the present order, undertake to discuss only the timely, relevant arguments.

Cir. 1985) (court addresses distinct question dealing with adequacy of filing).

The appellants' "jurisdictional" argument fails for a similar reason. Although it might, perhaps, be argued that a bankruptcy court abuses its discretion when it compromises the rights of a non-party, the present appellants simply cannot make that argument. There was no tangible evidence that St. Joe Paper Company (the non-party in question) even held a continuing ownership interest. Nor was there any evidence that St. Joe Paper Company held a claim for the recovery of tax overpayments. *See Order*, at 4-5. Far from demonstrating that the settlement was unfair, then, the appellants' jurisdictional argument – *viz.* that a bankruptcy court cannot approve a settlement absent the participation of a non-party whose interest cannot be proved – is meritless.

Examination of the remaining arguments leads to the same conclusion. First, the appellants argue that the County's tax assessments were discriminatory and thus violative of the Equal Protection Clause. Compromising this claim in favor of settlement was, however, hardly an abuse of discretion: the taxpayer seeking to prevail on a discrimination claim faces an extremely stringent burden of proof, *see Testimony of John Fletcher*, at 11 (discussing burden of proof); *Testimony of A. H. Blake*, at 39 (noting that "[t]o win an ad valorem tax case is pretty near impossible"); *Deltona Corporation v. Bailey*, 336 So. 2d 1163, 1168 (Fla. 1976) (Plaintiff whose property is assessed at fair market value must prove that "his property is assessed at a percentage of value substantially higher than the percentage at which all other property in the county is generally assessed") (*emphasis added*), and

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the present appellants have not been able to surmount that burden in any of their repeated, costly state court forays.

Finally, the court rejects the appellants' comprehensive "unfairness" argument. The gist of this argument is that the settlement impermissibly favored the Bank over the trust, and that the bankruptcy court approved a proposal which was a "bad deal" for the trust. The bankruptcy court, however, found that the proposal played no favorites. The court also found that the settlement redounded to the trust's best interests. These findings are well supported by credible evidence. Accordingly, the clearly erroneous standard precludes this court from substituting its own factual findings for those of the bankruptcy court.

Conclusion

The court has carefully reviewed the record, the bankruptcy court's rulings, and the arguments which support and attack those rulings. This court believes that the bankruptcy court conducted a thorough inquiry into the propriety of settlement, and that its ultimate decision was clearly articulated and well supported. The court also finds that the settlement was eminently fair, reasonable, and in the best interests of the estate. The appellants' contrary arguments do not warrant a different conclusion. Accordingly, the bankruptcy court's rulings must be *AFFIRMED*.

DONE AND ORDERED at Miami, Florida this 6th day of July, 1989.

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/s/ C. Clyde Atkins
UNITED STATES
DISTRICT JUDGE

cc: Mr. Robert M. Musselman
Mr. Robert A. Mark
Mr. Theodore B. Gould
Mr. Herbert Stettin
Mr. Thomas F. Noone
Mr. S. Harvey Zeigler
Mr. James Kracht & Mr. Daniel Weiss
Mr. Fred Stanton Smith
Mr. Vance E. Salter
Mr. James F. McAuley

APPENDIX H

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

CHOPIN ASSOCIATES, acting by	:	CASE NOS:
THEODORE B. GOULD and	:	84-01590-
MIAMI CENTER CORPORATION,	:	BKC-SMW
Its Partners, and	:	84-01591-
MIAMI CENTER LIMITED	:	BKC-SMW
PARTNERSHIP, Acting by	:	84-01592-
THEODORE B. GOULD and	:	BKC-SMW
MIAMI CENTER CORPORATION,	:	84-01593-
Its General Partners,	:	BKC-SMW
Plaintiffs,	:	84-01594-
	:	BKC-SMW

v.

FRED STANTON SMITH, as	:	
Trustee of THE MIAMI	:	
CENTER LIQUIDATING TRUST,	:	
THE BANK OF NEW YORK,	:	
CITY NATIONAL BANK OF	:	
MIAMI, As Trustee of Land	:	ADVERSARY
Trust #5008793,	:	CASE NO.
DADE COUNTY, FLORIDA,	:	
a Municipality,	:	
JOEL ROBBINS, as Property	:	
Appraiser of DADE COUNTY,	:	
FLORIDA,	:	
FRED GANZ, as Tax Collector	:	
of DADE COUNTY, FLORIDA,	:	
RANDALL MILLER, as	:	
Executive Director of the	:	
FLORIDA DEPARTMENT OF	:	
REVENUE,	:	

S. HARVEY ZIEGLER, as
Escrow Agent for the MIAMI
CENTER LIQUIDATING TRUST,
and

HERBERT STETTIN, as
Escrow Agent for the MIAMI
CENTER LIQUIDATING TRUST

COMPLAINT FOR DECLARATORY
INJUNCTIVE AND OTHER RELIEF
JURISDICTION AND VENUE

1. This Court has jurisdiction over this adversary proceeding pertaining to the adjudication of matters and claims pursuant to 28 U.S.C. Section 1334(a), and 157(a), and Bankruptcy Rules 7001(2) and 7001(7).
2. Venue is based upon 28 U.S.C. Section 1409(a).

BACKGROUND

3. Plaintiff Chopin Associates, a discharged debtor in the above-captioned Chapter 11 Proceeding, is a Florida general partnership, whose general partners are Miami Center Corporation and Theodore B. Gould.

4. Plaintiff Theodore B. Gould, a discharged debtor in the above-captioned Chapter 11 proceeding, is a resident of the State of Virginia.

5. Plaintiff Miami Center Corporation, a discharged debtor in the above-captioned Chapter 11 proceeding, is a Florida corporation.

6. Plaintiff Miami Center Limited Partnership ("MCLP"), a discharged debtor in the above-captioned Chapter 11 proceeding, is a Florida limited partnership,

whose general partners are Theodore B. Gould and Miami Center Corporation.

7. Defendant Fred Stanton Smith (the "Trustee") is trustee of the Miami Center Liquidating Trust which Trust was created under the Amended Consolidated Plan of Reorganization ("the BNY Plan") proposed by Defendant the Bank of New York, and of which Trust the Plaintiffs are stated to be the residual beneficiaries.

8. Defendant The Bank of New York ("BNY") is a New York banking corporation with its principal place of business in New York, New York, and also doing business in Miami, Florida.

9. Defendant City National Bank of Miami ("CNB") is a trustee of a certain land trust known as Trust No. 5008793 (the "Land Trust") under a land trust agreement dated October 10, 1985, designating M. C. Holdings Partners ("M. C. Holdings") as its sole beneficiary.

10. Defendant Dade County, Florida (hereinafter referred to as "DADE"), is a political subdivision within the meaning of Florida Constitution Article 8, Sections 6(e) and (f), and may exercise all the powers conferred now or hereafter by general law upon municipalities created pursuant to Article VIII, Sections 9, 10, 11, and 24 of the Florida Constitution of 1885, as amended, and operating pursuant to the provisions of the Metropolitan Dade County Home Rule Charter as amended from time to time. Among other powers, the Florida Constitution of 1885, as amended and revised in 1968, Article VIII, Section (1)(b), grants to DADE the power to "levy and collect such taxes as may be authorized by general law and no other taxes."

11. Defendant JOEL ROBBINS is sued in his capacity as PROPERTY APPRAISER OF DADE COUNTY, FLORIDA (hereinafter referred to as "PROPERTY APPRAISER"). The PROPERTY APPRAISER is a constitutional officer created by the provisions of FLA. CONST. Art. 2, Section 5 and Art. 8, Section 1(d). As a constitutional officer, the PROPERTY APPRAISER is charged with the duty to "secure a just valuation of all property for *ad valorem* taxation" pursuant to the provisions of FLA. CONST., Art. 7, Section 4 and Fla. Stat. Ann. Sections 193.011, 193.023, 193.042, and 193.114(1).

12. Defendant FRED GANZ is sued in his capacity as TAX COLLECTOR OF DADE COUNTY, FLORIDA (hereinafter referred to as "TAX COLLECTOR"). The TAX COLLECTOR is a constitutional officer created by the provisions of FLA. CONST. Art. 2, Section 5, and Art. 8, Section 1(d). As a constitutional officer, the TAX COLLECTOR is charged with the duty to "collect all *ad valorem* taxes for municipalities within his county." Fla. Stat. Ann. Section 193.116(2).

13. Defendant RANDALL MILLER is sued in his capacity as EXECUTIVE DIRECTOR OF THE FLORIDA DEPARTMENT OF REVENUE (hereinafter referred to as "THE DEPARTMENT OF REVENUE"). THE DEPARTMENT OF REVENUE is charged by the provisions of FLA. STAT. ANN. Sections 193.023(3), 195.052(6), 193.085(2), 193.114(2), and 193.1142 *et seq.* with overseeing the duties of the PROPERTY APPRAISER in certain key respects.

14. Defendant S. HARVEY ZIEGLER, Escrow Agent ("ZIEGLER"), and HERBERT STETTIN, Escrow Agent

("STETTIN"), are residents of Florida, and attorneys representing BNY and the Trustee, respectively, in these Chapter 11 proceedings and act jointly in their capacities as escrow agents appointed by this Court, as hereinafter alleged.

15. The Plaintiffs filed their voluntary Chapter 11 petitions in bankruptcy with the United States Bankruptcy Court for the Southern District of Florida on August 22, 1984.

16. Defendants DADE, PROPERTY APPRAISER, TAX COLLECTOR, and DEPARTMENT OF REVENUE (hereinafter collectively the "Dade Defendants") received actual or constructive notice from the United States Bankruptcy Court for the Southern District of Florida of the filings of the various Chapter 11 proceedings.

17. The United States Bankruptcy Court for the Southern District of Florida entered an order setting the final date for filing proofs of claim in the Chapter 11 cases of the Debtors listed above as December 20, 1984; by Order dated December 27, 1984, the United States Bankruptcy Court for the Southern District of Florida extended the final date for filing proofs of claim in the bankruptcy cases listed above to January 15, 1985. No further extension of this "bar date" has been granted.

18. Having received actual or constructive notice of the filing of the bankruptcy petitions in these cases, Defendants DADE, PROPERTY APPRAISER, and TAX COLLECTOR failed to file any proofs of claim for *ad valorem* real property taxes for any of the years in dispute, namely, from 1982 through 1985.

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19. The BNY Plan was confirmed by Order of the United States Bankruptcy Court for the Southern District of Florida entered on August 8, 1985, and took effect on October 10, 1985. Pursuant to 11 U.S.C. Sections 1141(d)(1) and 523(a), the tax claims of Defendants DADE, PROPERTY APPRAISER, TAX COLLECTOR, and DEPARTMENT OF REVENUE were discharged in bankruptcy upon confirmation of the plan.

20. Both prior to and after the filing of the bankruptcy petitions in this case, MCLP owned certain leasehold improvements located within Miami, Dade County, Florida, formerly known as the Edward Ball Office Building, the Pavillion Hotel, and the parking garage adjacent thereto, all situated on land owned by Plaintiff Chopin (the "Miami Center Property"). MCLP leased the land owned by Chopin under a ground lease which provided that MCLP was responsible for the payment of real estate taxes on the Miami Center Property. Defendant DADE, acting through the PROPERTY APPRAISER and TAX COLLECTOR, assessed *ad valorem* taxes on this property for the tax years 1982 through 1985, all of which were within the jurisdiction of the bankruptcy laws of the United States as a result of the petitions filed by the Plaintiffs.

21. The Plaintiffs have contested all assessed *ad valorem* real property taxes for the years 1982 through 1985 in the state courts of appropriate jurisdiction.

22. The value of the Miami Center Property has never exceeded the amount of the outstanding mortgage indebtedness against it during the years 1982 through 1985.

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23. Pursuant to 11 U.S.C. Sections 502(b) and 502(b)(4), the tax claims for the years 1982 through 1985 of Defendants DADE, PROPERTY APPRAISER, and TAX COLLECTOR should be disallowed by this Court, since no claim was filed on or before the "bar date," as extended.

24. On October 10, 1985, the Trustee delivered to CNB, as designee for Defendant BNY, a deed to the Miami Center Property, at which time Defendants CNB and BNY took, and the Trustee allowed, a credit against the purchase price in the amount of \$4,291,625.46 representing the Purchaser's pro-rata portion of the real estate taxes as assessed by Defendants DADE, PROPERTY APPRAISER, and TAX COLLECTOR for 1985, although the amount of these taxes was already being contested.

25. Plaintiffs were not permitted by either Defendant Trustee or Defendants CNB and BNY to participate in any way in the October 10, 1985, closing.

26. At the October 10, 1985, closing, BNY delivered to the Trustee a letter of indemnity, which provided that

"Pursuant to your request, the Bank of New York hereby indemnifies and agrees to hold harmless Fred Stanton Smith as Liquidating Trustee under the Miami Center Liquidating Trust for any claims against said Liquidating Trustee, as a result of the execution of the Contract in the manner set forth in the above quoted provisions or any other provision of the plan."

A copy of this indemnity letter is attached as Exhibit A.

27. On January 29, 1986, the United States Bankruptcy Court (Britton, J.) entered an order (attached hereto as Exhibit B), which provided that the Trustee and his counsel

" . . . shall not, without approval in writing from Theodore B. Gould, undertake the defense of, participate in any negotiations or undertake any lawsuit, in connection with the claims, filed or unfiled, made by Metropolitan Dade County of the City of Miami for the payment of any real and personal property taxes alleged to be owing to them by any of the Debtor estates."

28. On September 19, 1986, this Court entered an order (attached as Exhibit C) which modified the order of January 29, 1986, and permitted the Trustee to *participate* with *Theodore B. Gould* in litigation, compromise, or settlement of any *ad valorem* taxes.

29. On the basis of the foregoing orders (Exhibits B and C), this Court denied a motion brought by the Trustee to vacate the January 29, 1986, order and to permit the Trustee's unilateral settlement of *ad valorem* taxes.

30. Despite repeated urging by Plaintiffs, as residual beneficiaries of the Trust, the Trustee has failed or refused to initiate, or participate in, an adversary proceeding in this Court to obtain a final determination that Defendants DADE, PROPERTY APPRAISER, and TAX COLLECTOR are barred from the collection of *ad valorem* real property taxes on this property from the funds of the Trust, as a result of their failure to file a timely claim in these proceedings.

31. On information and belief, Plaintiffs aver that the Trustee, in concert with Defendant BNY, has unilaterally engaged in negotiations with the Dade County taxing authorities, in violation of the orders of this Court, and is preparing to compromise Plaintiffs' disputes in a manner advantageous to Defendant BNY, but harmful to Plaintiffs, as residual beneficiaries of the Trust.

32. On February 4, 1988, this Court entered an order (attached as Exhibit D) which established an escrow of funds (the "Escrow Funds") with Defendants ZIEGLER and STETTIN as Escrow Agents, "set up for the purpose of paying *ad valorem* taxes if any due on the Miami Center Property" and reserving jurisdiction to "determine at a later date, by appropriate adversary complaint or otherwise, all remaining issues" concerning the said *ad valorem* taxes.

COUNT I

DECLARATORY AND INJUNCTIVE RELIEF
AS TO THE *AD VALOREM* TAX CLAIMS

33. Plaintiffs re-allege the allegations contained in paragraphs 1 though 32, above.

34. Despite having actual and/or constructive notice of the Chapter 11 proceedings and of the Plaintiffs' disputes with regard to *ad valorem* taxes, Defendants DADE, PROPERTY APPRAISER, and TAX COLLECTOR never filed a proof of claim in the Chapter 11 proceedings prior to the bar date established by the Court and never filed any application for allowance of administrative expenses (with respect to the tax year 1985) prior to the

confirmation of the BNY Plan, which confirmation, pursuant to 11 U.S.C. Section 1141, acts as a discharge of all pre-confirmation debts, including the said *ad valorem* tax obligations.

35. Accordingly, Dade County is barred from asserting any claim for payment of said *ad valorem* taxes in these proceedings.

WHEREFORE, Plaintiffs pray that this Court declare their rights with respect to all matters pleaded herein, including specifically:

(a) Enforce the injunction of 11 U.S.C. Section 524 against the commencement or continuation of any action by Defendants DADE, PROPERTY APPRAISER, TAX COLLECTOR, and EXECUTIVE DIRECTOR, the employment of process, or any other act, to collect, recover, or offset any debt as a personal liability of the TRUST, and against the commencement or continuation of any action, the employment of process, or any other act, to collect or recover from, or offset against property of the TRUST as a result of their failure to file a Proof of Claim before the bar date of January 15, 1985, or an Application for Administrative Expense before the Effective Date of the Plan's confirmation, October 10, 1985.

(b). Alternatively, pursuant to 11 U.S.C. Section 506(b), to declare that said Defendants, as non-consensual lien claimants, are not entitled to collect any interest accruing subsequent to the date of the filing of Plaintiffs' petition, August 22, 1984, on *ad valorem* tax claims.

(c). For such other and general relief as this court deems just and equitable under all of the facts and circumstances of this case.

COUNT II
DECLARATORY AND INJUNCTIVE
RELIEF AS TO THE TRUSTEE

36. Plaintiffs re-allege the allegations contained in Paragraphs 1 though 35, above.

37. The Trustee is precluded, as a matter of law, from making payment from the funds currently possessed by the Trustee, or from the Escrow Funds, to Defendants DADE, PROPERTY APPRAISER, TAX COLLECTOR, and EXECUTIVE DIRECTOR, or any of them, as to *ad valorem* taxes.

WHEREFORE, Plaintiffs pray that this Court declare their rights with respect to all matters pleaded herein, including specifically ordering:

(a) Enjoin the Trustee from taking any action, in concert with BNY or otherwise, to effectuate a compromise or settlement of Plaintiffs' disputes with the DADE DEFENDANTS, or any of them;

(b) Enjoin Defendant BNY from taking any action, in concert with the Trustee or otherwise, to effectuate any compromise or settlement with the DADE DEFENDANTS, or any of them, which affects in any way the amount of the tax liability for the years 1982 through 1985, inclusive.

(c) Enjoin the Trustee from making any payment to the DADE DEFENDANTS from the funds or assets presently possessed by the Trustee or from the Escrow Funds.

(d) Order Defendants ZIEGLER and STETTIN, Escrow Agents, to pay over, free and clear of any escrow, the Escrow Funds to the Miami Center Liquidating Trust, for the benefit of Plaintiffs, and subject to the injunctions requested in this count.

COUNT III

DECLARATION AS TO THE LIABILITY OF BNY UNDER THE INDEMNITY LETTER

38. Plaintiffs re-allege the allegations contained in Paragraphs 1 through 37, above.

39. The actions of the Trustee in allowing BNY and CNB to take a credit at the October 10, 1985, closing for 1985 *ad valorem* real estate taxes, despite the lack of any enforceable obligation therefor, constituted breach of the Trustee's fiduciary duty to Plaintiffs, as residuary beneficiaries of the Trust. Said breach damaged the Trust and Plaintiffs as residuary beneficiaries thereof.

40. The Trustee took such action in reliance upon the October 10, 1985, Letter of Indemnity (Exhibit A) from BNY.

41. Defendant BNY is liable, jointly and severally with Defendant CNB, for the repayment to the Trust, for the benefit of Plaintiffs, of the sum wrongfully taken as a credit for real estate taxes on October 10, 1985, plus interest.

42. To the extent that the Trustee is held responsible for the payment of any amount to the DADE DEFENDANTS, for purposes of the removal of DADE'S non-consensual liens on the Miami Center Property, or any other reason, BNY, pursuant to its said Letter of Indemnity, is liable to the Trust, for the benefit of Plaintiffs as residual beneficiaries, for the reimbursement of that amount.

WHEREFORE, Plaintiffs pray that this Court declare their rights with respect to all matters pleaded herein, including specifically:

- (a) Order Defendants BNY and CNB, jointly and severally, to pay into the Miami Center Liquidating Trust, for the benefit of Plaintiffs, the sum of \$4,291,625.46 plus interest thereon from October 10, 1985.
- (b) Declare that Defendant BNY, pursuant to its Letter of Indemnity, is liable to the Miami Center Liquidating Trust, for the benefit of Plaintiffs, for any and all sums for which the funds presently possessed by the Trustee or the Escrow Funds are held payable to the DADE DEFENDANTS.
- (c) For such other relief as this Court deems appropriate.

Respectfully submitted,

CHOPIN ASSOCIATES,
MIAMI CENTER CORPORATION, as
General Partner of
MIAMI CENTER LIMITED PARTNERSHIP

By: /s/ Robert M. Musselman
Robert M. Musselman
Robert M. Musselman and
Associates
413 Seventh Street N.E.
Charlottesville, VA 22901
(804) 977-4500

By: _____
Robert A Mark
Stearns, Weaver, Miller, Weissler,
Alhadeff & Sitterson, P.A.
Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3440

/s/ Theodore B. Gould
Theodore B. Gould,
General Partner
of Chopin Associates and
Miami Center Limited
Partnership,
pro se
2564-B Ivy Road
Charlottesville, VA 22901
(804) 295-7125

APPENDIX I

RECEIVED MAR 29 1988

IN THE UNITED STATES
BANKRUPTCY COURT IN AND
FOR THE SOUTHERN
DISTRICT OF FLORIDA

CASE NO. 84-01590/91/
92/93/94 BKC SMW

HOLYWELL CORPORATION,

Debtor.

MOTION FOR HEARING ON AND APPROVAL OF
COMPROMISE OF AD VALOREM TAX CLAIMS

The Liquidating Trustee, through counsel, moves the court for an Order authorizing a compromise of all ad valorem real property tax claims involving Dade County against the Liquidating Trust and the property previously titled in the name of the Debtors and says:

1. There is presently pending in the Circuit Court and the Third District Court of Appeal of Dade County a series of lawsuits involving the Debtors, Dade County, and the Liquidating Trust arising out of contested ad valorem and real property tax claims involving the years 1979-1985.
2. The Circuit Court litigation referred to above has been pending with the full knowledge and consent of this Court. This Court has previously authorized employment of special counsel and expert witnesses, as well as the payment of costs and fees in conjunction therewith, to

enable continued prosecution of each of the pending circuit court ad valorem tax lawsuits.

3. After protracted negotiations, the Liquidating Trustee and the Bank of New York, have reached a settlement with Dade County for the settlement of all claims for ad valorem real property taxes and People Mover special assessments, as well as ancillary matters related thereto, on the terms contained in the letters from James K. Kracht, Assistant County attorney, to Herbert Stettin, attorney for the Liquidating Trustee, and William Shockett, attorney for the Bank of New York dated February 24, 1988, and the response letter dated March 17, 1988, copies of which are attached hereto as Exhibit A. Attached hereto as Exhibit B is a schedule of the additional taxes and interest due if paid on or before March 31, 1988.

4. The Liquidating Trustee believes the settlement agreement as discussed above is in the best interest of the Trust estate and its creditors. That is, if approved, this settlement will cause a termination of the ongoing state court proceedings which have continued to drain this estate of significant resources, while at the same time achieving an overall substantial tax savings for the benefit of the estate and its creditors.

5. The Bank of New York has consented to pay all of the additional taxes and interest due for the year 1985, hence, the Liquidating Trust will pay \$3,430,754 as its share of the additional tax due. In addition, the Bank of New York has agreed to a credit in favor of the Liquidating Trust in an amount due on reparation of the 1985 taxes based upon an assessment of \$162,500,000. The Liquidating Trustee and the Bank of New York have

agreed to allow the Court to determine whether the additional sum due the Liquidating Trust as a result of this reparation will be paid to the trust in cash or will be allowed as a set-off in favor of the Trust against any monies to otherwise be due from the Trust as post-closing adjustments. The Trust and the Bank of New York have further agreed to have the Court determine whether interest shall be included as part of the monies due the Trust on this reparation.

6. The settlement proposal requires that the Court approve the settlement and direct payment of the sums set forth in the agreement to the Dade County Tax Collector. Such payment shall be in full and complete settlement of all claims or issues between these parties, as well as for the discharge of any liens which might have been or are presently attached to the property in question for the years 1979-85.

7. As a part of this settlement agreement, the Court is further requested to direct the Liquidating Trustee, as the real party in interest in the circuit court ad valorem tax actions for the years 1979-85, to intervene therein and cooperate in entry of the necessary voluntary dismissal or final judgments in order to finalize the agreed upon assessments as set forth in Exhibit B to this motion.

Wherefore, the Liquidating Trustee moves the Court for an Order setting a hearing on whether the settlement proposal to settle the ad valorem tax claims should be approved, as well as for an order approving the settlement, and directing both payment to the Dade County Tax Collector, and termination of the pending circuit court actions.

I HEREBY CERTIFY that true and correct copies of the foregoing were furnished by mail this 23 day of March, 1988, to all counsel of record.

HERBERT STETTIN, P.A.
One S.E. Third Avenue, #2215
Miami, Florida 33131
Tel: 305/374-3353

By: /s/ Herbert Stettin
Herbert Stettin

APPENDIX J
COUNTY ATTORNEY
METROPOLITAN DADE COUNTY, FLORIDA

2810
DE CENTER
ST STREET
33128-1993
75-5151

February 24, 1988

Herbert Stettin, P.A.
2215 Amerifirst Building
One Southeast Third Avenue
Miami, Florida 33131

William E. Shockett, Esquire
25 West Flagler Street
Miami, Florida 33130

Re: Settlement of Miami Center/Gould
Ad Valorem Taxes/1979-1987

Dear Herb and Bill:

This letter is written for settlement purposes only, as an attempt to set forth our understanding and agreements with respect to resolution of the 1979 through 1987 real property taxes on the Miami Center Project vacant land, together with the hotel and office building, hereinafter referred to as the Miami Center Project. With respect thereto, the following sets forth my perception of our agreement, and your signatures affixed hereto shall constitute the Liquidating Trustee's and Bank of New York/City National Bank's acquiescence.

1. First, it is understood and agreed by these parties that the Liquidating Trustee, Fred Stanton Smith, as the real party in interest for the purpose of tax liability and/or entitlement to tax refunds in the pending Circuit Court

App. 64

actions involving 1979 through 1985 real property taxes on the Miami Center Project, shall pay to the Dade County Tax Collector on or before March 31, 1988, the sum of \$6,147,209.21. This sum shall be paid to and accepted by Dade County in consideration and full satisfaction of all issues, interests and legal matters which were or could have been raised before either the Bankruptcy Court or the Dade County Circuit Court concerning real property taxes for 1979 through 1985, including but not limited to questions of entitlement to interest, the filing of a proof of claim, and the valuation of the property in question for each of the involved years.

2. Second, it is further understood and agreed that the Liquidating Trustee will immediately upon execution of this letter undertake the obtaining of authorization from the Bankruptcy Court to pay the amount set forth in paragraph 1 to the Dade County Tax Collector on or before March 31, 1988. Absent such payment on the date hereinabove set forth, this agreement shall stand null and void and of no further force and effect, at the option of the County.

3. Third, in conjunction with the Liquidating Trustee's obtaining authorization for payment from the Bankruptcy Court, the Trustee shall also obtain an order from the Bankruptcy Court directing him, as the real party in interest in these tax matters, to be substituted in each of the pending Circuit Court actions for 1979 through 1985. Such substitution shall be ordered by the Court for the purpose of effectuating the necessary voluntary dismissal or execution of interrogatories and obtaining of a final judgment modifying the particular

assessment at issue. This is necessary in order to accomplish proper entries on the Dade County tax rolls, and to accomplish termination of the litigation which has been pending in the Circuit Court, at the instance of and with the knowledge, consent and/or approval of the United States Bankruptcy Court.

4. Fourth, it is understood and agreed that payment of the above-referenced sum shall be made to the Dade County Tax Collector immediately upon execution of the order authorizing such payment from the Bankruptcy Court, but in no event later than March 31, 1988.

5. Fifth, it is further understood and agreed that the trustees shall recommend to the Bankruptcy court payment of this amount in full satisfaction of all parties' respective interests in the various issues which have arisen or could have been raised in the context of these controversies.

6. Sixth, it is further understood and agreed by these parties that the City National Bank/Bank of New York shall pay to the Dade County Tax Collector on or before March 31, 1988, the sum of \$6,141,697.88 for 1986 and 1987 real property taxes, and 1987 personal property taxes. This sum shall be paid to and accepted by Dade County in consideration and full satisfaction of all issues, interests and legal matters which were or could have been raised before either the Bankruptcy Court or the Dade County Circuit Court concerning real property taxes for 1986 and 1987, and 1987 personal property taxes.

7. Seventh, it is further understood and agreed that the City National Bank/Bank of New York, in addition to

making the payment set forth in paragraph six above, will agree to resolve each of the pending Circuit Court actions, and a Circuit Court action to be filed timely to contest the 1987 assessments, in a manner which will accurately reflect payment of the above-referenced sum on or before March 31, 1988, by executing all necessary interrogatories.

8. Finally, it is understood that each and every provision of this agreement is dependent upon and tied to each and every other provision hereof, and not severable. Moreover, by operation of the provisions of this agreement, Dade County shall receive the sum of \$12,288,907.09 on or before March 31, 1988.

Thank you for your cooperation. Please indicate your agreement with the above provisions by executing and returning to me the enclosed letter as soon as possible.

Very truly yours,

/s/ James K. Kracht
James K. Kracht
Assistant County Attorney

JJK/dpk

Accepted by: /s/ Herbert Stettin
 Herbert Stettin,
 on behalf of Fred
 Stanton Smith, a
 Liquidating Trustee
 Date: 3-17-88

Accepted by: /s/ William Shockett
William Shockett,
on behalf of both City
National Bank, as
Trustee, and Bank of
New York

Date: 3/18/88

APPENDIX K

**IN THE UNITED STATES
BANKRUPTCY COURT IN AND
FOR THE SOUTHERN
DISTRICT OF FLORIDA**

**CASE NO. 84-01590/91/
92/93/94 BKC SMW**

**HOLYWELL
CORPORATION,
Debtor.**

**STIPULATION AMENDING
SETTLEMENT OF AD
VALOREM TAX CLAIMS**

/

The Bank of New York, through S. Harvey Ziegler, Esquire, Fred Stanton Smith, as Liquidating Trustee of the Miami Center Liquidating Trust, through Herbert Stettin, Esquire, and the Dade County Taxing Officials, through James K. Kracht, Esquire, Assistant County Attorney, stipulate and agree on behalf of the respective parties to amend and modify the ad valorem tax settlement now pending before the Bankruptcy Court in and for the Southern District of Florida, pertaining to the 1979 through 1985 real and personal property taxes on the Miami Center Project located in Miami, Florida.

1. This Stipulation is voluntarily entered into and is to be deemed an amendment to and does incorporate herein by reference all of the provisions contained in the settlement letters previously executed by representative of these parties under dates of February 24, March 17 and March 22, 1988.

2. Pursuant to the provisions of the original settlement, the Liquidating Trust was to pay to Dade County \$3,430,753.97 for 1982 through 1984 real property taxes on

the Miami Center, inclusive of interest through March 31, 1988. Said 1982 through 1984 real property taxes accumulated post-petition interest of \$110,429.87 from their respective dates of delinquency up to the time of the sale of the Miami Center Project. This sum of \$110,429.87 is hereby deducted from the \$3,430,753.97, as of March 31, 1988, to be paid to the County by the Liquidating Trust. At the time of the consummation of the settlement, the approval of which now pends before the Bankruptcy Court, the sum of \$110,429.87 as post-petition interest on the 1982 through 1984 real property taxes, shall be paid to the County by the Bank of New York.

3. The settlement proposal is further amended by making the following adjustments to the 1984 tax year. The agreed-upon assessed value will be \$162,500,000.00 As a result of this adjustment, the Liquidating Trust agrees to pay as additional taxes and interest the amount of \$55,773.90.

4. As a result of the adjustments set forth in paragraphs 2 and 3 hereof, the amount to be paid by the Liquidating Trust as of March 31, 1988 shall be adjusted from \$3,430,753.97 to \$3,320,883.07, resulting in a net savings to the Liquiating [sic] Trust as of March 31, 1988 in the amount of \$109,870.90.

5. As a result of the modifications and amendments set forth above, and in accordance with the March 22, 1988 letter from Assistant County Attorney James K. Kracht to Herbert Stettin, Esquire, extending the due date of payment under the original settlement agreement so as to obtain final court approval, it is understood and agreed that with respect to the unpaid 1982 through 1984

real property taxes, interest is accruing at the rate of \$25,455.41 per month from April 1, 1988. With respect to the still unpaid 1985 taxes, to be paid by the Bank of New York upon approval of this settlement, interest is accruing at the rate of \$21,906.90 per month from April 1, 1988.

6. It is further understood and agreed as between the Bank of New York, the County and the Liquidating Trustee that the terms of the settlement as set forth in the letters referenced in paragraph 1 hereof, as amended by this Stipulation, shall constitute the full and complete agreement with respect to any and all rights, claims, liabilities, or issues arising in connection with the 1979 through 1985 real and personal property taxes on the Miami Center Project.

DATED this 29th day of August, 1988, at Miami, Dade County, Florida.

Kirkpatrick & Lockhart
2000 Miami Center
100 Chopin Plaza
Miami, FL 33131

/s/ S H Ziegler
S. HARVEY ZIEGLER, ESQUIRE DATE

Herbert Stettin, Esquire
2215 AmeriFirst Bldg.
One Southeast Third Avenue
Miami, Florida 33131

/s/ Herbert Stettin
HERBERT STETTIN, ESQUIRE DATE 10-4-88

ROBERT A. GINSBURG
Dade County Attorney
Metro-Dade Center, Suite 2810
111 N.W. 1st Street
Miami, FL 33128-1993

/s/ James K. Kracht
JAMES K. KRACHT
Assistant
County Attorney

DATE

APPENDIX L

30390AAS

**IN THE UNITED STATES BANK-
RUPTCY COURT IN AND FOR
THE SOUTHERN DISTRICT OF
FLORIDA**

IN RE:

**HOLYWELL
CORPORATION,
et al.**

CASE NO:

84-01590-BKC-SMW

84-01591-BKC-SMW

84-01592-BKC-SMW

84-01593-BKC-SMW

84-01594-BKC-SMW

**CHOPIN ASSOCIATES, acting
by THEODORE B. GOULD and
MIAMI CENTER CORPORATION,
Its Partners, and**

**MIAMI CENTER LIMITED
PARTNERSHIP, Acting by
THEODORE B. GOULD and MIAMI
CENTER CORPORATION, Its
General Partners,**

**ADV. NO.
88-0117-
BKC-SMW-A**

Plaintiffs,

vs.

**FRED STANTON SMITH, as
Trustee of THE MIAMI CENTER
LIQUIDATING TRUST,**

**THE BANK OF NEW YORK,
CITY NATIONAL BANK OF
MIAMI, as Trustee of Land
Trust #5008793,**

**DADE COUNTY, FLORIDA, a
Municipality,**

JOEL ROBBINS, as Property
Appraiser of DADE COUNTY
FLORIDA

FRED GANZ, as Tax
Collector of DADE COUNTY,
FLORIDA

/

ORDER APPROVING AMENDED SETTLEMENT
OF AD VALOREM TAX CLAIMS

THIS CAUSE came before the Court for hearing in Miami on October 31, 1988 pursuant to an Order Setting Hearing on Trustee's Motion For Approval Of Amended Stipulation Settling Ad Valorem Tax Claims, dated October 11, 1988. The Court has heard the testimony presented, examined the exhibits received into evidence, observed the candor and demeanor of the witnesses who testified, considered the argument of counsel, and is otherwise fully advised in the premises. Based upon that testimony, exhibits and argument, the Court makes the following findings of fact and conclusions of law:

1. The Court had previously scheduled a hearing on a Motion for Approval of Compromise of Ad Valorem Tax Claims on April 28, 1988, and consolidated that hearing with a pending adversary proceeding brought by Chopin Associates et al., case# 88-0117-BKC-SMW-A.
2. On October 31, 1988, the Liquidating Trustee moved the Court to take judicial notice of all of the testimony, exhibits and argument received by the Court at the hearing held on April 28, 1988. No party in interest voiced any objection to this and the Court orally granted the motion. The Court has therefore, taken cognizance of and has considered as a part of the record concerning the

Amended Settlement of Ad Valorem Tax Claims, the record made before the Court on the proposed settlement of the ad valorem tax claims previously heard on April 28, 1988.

3. On that date, the proponents of the settlement put in evidence testimony from John Fletcher, an attorney who specializes in ad valorem tax matters, that the burden of proof on a taxpayer requires proof by substantial competent evidence of the exclusion of every reasonable hypothesis of value used by the tax assessor, using recognized methods of valuation. Mr. Fletcher cited pertinent Florida law supporting this conclusion, and testified as to the difficulty imposed on a taxpayer in such circumstances.

4. The proponents of the settlement also elicited testimony from A.H. Blake, a former tax assessor of Dade County, that the tax settlement proposed was fair and reasonable, and was in the best interest of the liquidating trust. He concluded the settlement proposed favored the liquidating trust more than it did the Bank of New York.

5. The proponents also put in evidence the testimony of Fred S. Smith, the liquidating trustee. Mr. Smith is an experienced local real estate broker and testified that, based on his experience as a broker and as president of Keyes Corporation, he believed the settlement is in the best interest of the liquidating trust. He specifically identified the letter agreements of February 24, 1988 between the liquidating trust, the Bank of New York and the Dade County Attorney; the letter of March 17, 1988 modifying that letter agreement, and the letter of March 22, 1988 further modifying that agreement. He agreed with that

settlement and recommended it. In each instance, he confirmed the settlement was clearly favorable to the liquidating trust because it would terminate a number of pending ad valorem tax suits; would prevent exposure of the liquidating trust to judgments in favor of the County for sums far in excess of the sums to be paid under the terms of the settlement agreement; and would preserve the right of the debtors to continue to seek the invalidation of all claims asserted by the County for ad valorem taxes on the ground that no proofs of claim had ever been filed. The Court further notes that a settlement would stop the considerable attorneys' fee and cost expenses involved in prosecuting and defending the numerous state court ad valorem tax suits.

6. The Debtors placed into evidence a number of depositions taken in the adversary complaint, together with a large number of exhibits in support of their position that the proposed settlement was not in the best interest of creditors and that the County had no enforceable claims which it could assert because of its failure to file proofs of claim.

7. The County put on the testimony of Frank Jacobs, an assistant property appraiser, who testified as to the litigation risks and other considerations taken into account by the County in entering into the agreement. He also testified that the transaction was not structured in any manner so as to favor the Bank of New York over the liquidating trust.

8. The Court received evidence from Theodore B. Gould concerning the interest claimed by St. Joe Paper Company. Mr. Gould conceded he could not locate any

written agreement concerning any continuing ownership interest by St. Joe Paper Company, nor any written evidence of any claim which that company might have for the recovery of overpayment of taxes for 1979.

9. From the testimony presented and a review of the exhibits and other documents put in evidence, it appears the issues involved for the years 1979, 1980 and 1981 are for refunds of real property taxes paid based on claims of overassessment. The settlement proposed includes a waiver by the liquidating trust of any further claim for refund for those years, concomitant with a waiver by the County of all claims for additional taxes, including People Mover and other special assessments and for personal property taxes.

10. The principal issue in the 1983 tax dispute involves a demand by Dade County for additional ad valorem taxes based upon a dispute concerning whether the office building property was substantially completed on the valuation date. The County has conceded for purposes of this settlement that the property was not substantially complete; a very considerable savings to the liquidating trust.

11. The dispute for the years 1984 and 1985 concerns claims of additional taxes due based upon disputed assessments of the entire property. The settlement adjusts the assessments very considerably in favor of the liquidating trust.

12. As a preliminary, the Court takes note of the fact that the Plan of Reorganization, which was confirmed by the Court and which has been substantially consummated, reflected the value of the property in question

(inclusive of certain personal property) to be \$255,600,000. There were MAI appraisals supporting this valuation, and the Bank of New York through its nominee paid this sum on October 10, 1985. Under such circumstances there is the possibility the County would argue the disputed assessments for 1984 and 1985 were reasonable and the liquidating trust might be liable for taxes which would be substantially in excess of the amounts agreed upon in the settlement proposal.

13. Under the terms of the original settlement proposal of April, 1988, the parties agreed to a schedule of assessed values, additional taxes due, and some pre and post-petition interest on those sums. A copy of that schedule is attached to these findings as Exhibit A.

14. The sums agreed to be paid constitute full satisfaction of all issues, interest and claims for taxes which were or could have been raised in any of the pending ad valorem tax litigation or in the matters which were filed concerning these claims for taxes.

15. As part of this settlement proposal, the County also agreed to settle its disputed ad valorem tax claims with the Bank of New York for periods subsequent to 1985 when the Bank of New York was the owner of the property in question.

16. As an additional consideration to the liquidating trust in the settlement, the Bank of New York and the liquidating trust have agreed the bank will repropore the 1985 taxes previously received from the liquidating trust as a credit on the closing statement on October 10, 1985, and will refund to the liquidating trust those sums found to be due on reparation based on a reduced assessment,

together with interest at 6.91%. It was estimated this will result in the liquidating trust receiving \$400,000 to \$500,000.

17. As a further part of the agreement between the liquidating trust and the County, the liquidating trust agreed to pay interest on the sums due the County under the settlement, at the rate provided by Florida Law from and after April 1, 1988. Following the conclusion of the hearing on April 28, 1988, and the submission by the parties and review by the Court of post trial memoranda, the Court expressed the view that it was satisfied the settlement was in the best interest of the liquidating trust with the exception of those sums provided in the settlement agreement to be paid to Dade County representing post-petition preconfirmation interest, which totaled approximately \$155,000.00. The Court expressed the view that, as a matter of substantive law, payment of post-petition preconfirmation interest to a nonconsensual lien creditor was not permissible.

18. The liquidating trustee, the Bank of New York and Dade County requested the Court grant leave to conduct further discussions in an attempt to resolve this remaining issue. The Court encouraged this. Thereafter, an amended stipulation for settlement of the ad valorem tax claims was filed with the Court. It provided there would be an additional reduction of \$109,870.90 of the sums to be paid by the liquidating trust as ad valorem taxes to the County. This meant that the sums to be paid by the liquidating trust would be adjusted downward from \$3,430,753.97 to \$3,320,883.07. This sum, together with interest at the rate of \$25,455.41 per month from April 1, 1988, until paid to Dade County, would constitute

the entire obligation of the liquidating trust to the County.

19. The approval of the proposed amended settlement agreement is a matter Within this Court's sound discretion. See *In re Jackson Brewing Company*, 624 F.2d 599 (5th Cir. 1980); *In re Teltronics Services, Inc.*, 762 F.2d 185 (2d Cir. 1985); *In re Prudence Co.*, 98 F.2d 559 (2d Cir. 1938), cert. denied 306 U.S. 636, 59 S.Ct. 485, 83 L. Ed. 1037 (1939).

In order to exercise this discretion properly, the Court must consider all of the relevant facts and evaluate whether the compromise suggested falls below the "lowest point in the range of reasonableness." See e.g., *In re Teltronics Services, Inc.* *supra* at page 189; *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983). The Fifth Circuit in *In re Jackson Brewing Co.*, 624 F.2d at 602 stated as follows:

To assure a proper compromise the bankruptcy judge must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the 'terms of the compromise with the likely rewards of litigation.' *Protective Committee for Independent Stockholders of T.M.T. Trailer Ferry, Inc. v. Anderson*, ('T.M.T. Trailer'), 390 U.S. 414, 425, 88 S.Ct. 1157, 1163, 20 L. Ed. 2d 1, 10 (1968). He must evaluate and set forth in a comprehensible fashion:

- (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law,
- (2) the complexity and likely duration of the litigation and any attendant expense,
- (3) all factors bearing on the wisdom of the compromise.

Id. at 424-25, 88 S.Ct. at 1163, 20 L. Ed. 2d at 9-10.

20. In making its evaluation, this Court need not rest its decision whether to approve a settlement upon a resolution of ultimate factual and legal issues which underlie the disputes that are proposed to be compromised. *In re Teltronics Services, Inc., supra*. In a Fifth Circuit decision which is binding on this Court, *Florida Trailer and Equipment Company v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960), the Court stated:

Of course, the approval of a proposed settlement does not depend upon establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise. Thus, this Court need not resolve each disputed matter in determining the propriety of the settlement, rather, the Court may, and should, make a pragmatic decision on the basis of all equitable factors. (Emphasis added).

21. As noted in the prior discussion in this order, the Court has conducted both a legal and factual analysis

of the probable outcome of the pending ad valorem tax cases. It is not, however, necessary that the Court have gone through such an analysis to the point of reaching a binding conclusion that one party or the other would prevail. Certainly, the Court has recognized the complexity of all of the issues involved, the length of time required to resolve all of these issues, the expense involved in resolving all of these issues, the uncertainty of result, and the potential devastating effect an adverse ruling would have upon the liquidating trust and its ability to pay claims to creditors and return the surplus to the debtors.

22. The compromise proposed to the Court is one which is an exercise of business judgment which appears to the Court to be sound, reasonable and practical. It recognizes a large savings in tax to the liquidating trust; it permits the debtor, by appeal only, to continue its attempt to invalidate the tax claims in their entirety for failure of the taxing authorities to have filed proofs of claim in these proceedings; and it assists in the orderly completion of the work to be done in ending this case.

23. One of the obligations imposed by *Jackson Brewing Co., supra*, upon bankruptcy courts engaged in determining whether to approve a settlement proposed requires a consideration of "all the factors bearing on the wisdom of the compromise". The Court believes it has done so, and it recognizes the benefits which flow to each of the parties involved. The taxing authorities receive a substantial amount of cash and an end to time consuming and expensive litigation on their part. The Bank of New York receives property free of any further claims by the taxing authorities, and the debtors receive a resolution of

County tax claims on excellent terms. In sum, having reviewed the evidence and the documents received into evidence, together with having considered the equities involved, the Court finds and determines that the amended settlement agreement does not "fall below the lowest point in the range of reasonableness". The terms of the amended settlement are reasonable and in the best interest of the liquidating trust.

Accordingly, it is hereby ORDERED AND ADJUDGED:

1. That the Amended Settlement Agreement be and it is hereby ratified, confirmed and approved, pursuant to Bankruptcy Rule 9019(a);
2. That the parties hereto are directed to implement and comply with the terms of the Amended Settlement Agreement as set forth in its entirety.
3. The Court will enter a separate Final Judgment dismissing adversary proceeding 88-0117-BKC-SMW-A, in accordance with the terms of these findings.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida on this 18 day of November, 1988.

/s/ Sidney M. Weaver
BANKRUPTCY COURT JUDGE

Herbert Stettin, Esquire
will furnish copies to
all counsel of record
upon receipt of conformed
copy.

SERVICE LIST

Vance E. Salter, Esquire Coll, Davidson, Carter et al. Attorney for Bank of New York 3200 Edward Ball Building 100 Chopin Plaza Miami, Florida 33131	Daniel Weiss, Esquire James B. Kracht, Esquire Assistant County Attorney 111 N.W. 1st St. #2810 Miami, Florida 33128
Thomas F. Noone, Esquire Emmet, Marvin & Martin Attorney for Bank of New York 48 Wall Street New York, New York 10005	S. Harvey Ziegler, Esq. Kirkpatrick & Lockhart Attorney for Bank of NY 20th Floor Miami Center 100 Chopin Plaza Miami, Florida 33131
Robert Mark, Esquire Stearns, Weaver et al. Plaintiffs' Local Counsel 150 West Flagler Street Miami, Florida 33130	Robert Musselman, Esquire Plaintiffs' Attorney 413 7th Street NE Charlottesville, VA. 22901
Theodore B. Gould, Pro Se 2564 B. Ivy Road Charlottesville, VA. 22901	James McAuley, Esquire Department of Revenue The Carleton Building Room 204 Tallahassee, Fl. 32301
Fred Stanton Smith c/o Keyes Company Liquidating Trustee 100 North Biscayne Blvd. Miami, Florida 33132	HERBERT STETTIN, ESQUIRE Attorney for the Liquidating Trustee ONE S. E. THIRD AVENUE #2215 MIAMI, FLORIDA, 33131

APPENDIX M

IN RE:

HOLYWELL CORPORATION,
et al.

CHOPIN ASSOCIATES, acting
by THEODORE B. GOULD and
MIAMI CENTER
CORPORATION, Its Partners,
and

MIAMI CENTER LIMITED
PARTNERSHIP, Acting by
THEODORE B. GOULD and
MIAMI CENTER
CORPORATION, Its General
Partners,

Plaintiffs,

vs.

FRED STANTON SMITH, as
Trustee of THE MIAMI CENTER
LIQUIDATING TRUST,

THE BANK OF NEW YORK,
CITY NATIONAL BANK OF
MIAMI, as Trustee of Land Trust
#5008793,

DADE COUNTY, FLORIDA, a
Municipality,

JOEL ROBBINS, as Property
Appraiser of DADE COUNTY
FLORIDA

FRED GANZ, as Tax Collector of
DADE COUNTY, FLORIDA

IN THE UNITED
STATES
BANKRUPTCY
COURT IN AND
FOR THE
SOUTHERN
DISTRICT
OF FLORIDA

CASE NO:
84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

ADV. NO.
88-0117-BKC-SMW-A

FINAL JUDGMENT

The Court has this date entered an order approving amended settlement of ad valorem tax claims based upon findings and conclusions which are set forth in that order. The Court adopts and incorporates those findings and that order approving amended settlement of ad valorem tax claims as a part of this adversary proceeding.

In addition to the grounds set forth in that order, and in conformance with the Court's oral ruling announced on October 31, 1988, the Court finds and determines that Dade County is not barred from asserting a claim in these proceeding [sic] by reason of its failure to file proofs of claim in the Chapter 11 proceedings for ad valorem taxes for any of the years 1979 through 1985. All of the remaining issues raised in the Complaint are rendered moot by the Court's entry of the Order Approving Amended Settlement of Ad Valorem tax claims.

DONE AND ORDERED in Chambers in Maimi, Dade County, Florida on this 18 day of November, 1988.

/s/ Sidney M. Weaver
BANKRUPTCY COURT
JUDGE

Herbert Stettin, Esquire
will furnish copies to
all counsel of record
upon receipt of conformed
copy.

(2)
Supreme Court, U.S.

FILED

DEC 12 1990

JOSEPH F. SPANOL, JR.
CLERK

No. 90-761

in the
Supreme Court
of the
United States

October Term, 1990

In re Holywell Corporation, Theodore B. Gould,
Miami Center Limited Partnership,
Chopin Associates and Miami Center Corporation,
Debtors.
Chopin Associates, et al.,
Petitioners,
vs.
Fred Stanton Smith, as Trustee of the
Miami Center Liquidating Trust, et al.,
Respondents.

**BRIEF OF FRED STANTON SMITH, TRUSTEE
OF THE MIAMI CENTER LIQUIDATING TRUST,
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

Herbert Stettin, Esquire
Herbert Stettin, P.A.
One S.E. Third Avenue #2215
Miami, Florida 33131
Telephone (305) 374-3353
Attorney for Respondent
Fred Stanton Smith, as Trustee of
the Miami Center Liquidating Trust

QUESTION PRESENTED

Whether the Petition for Writ of Certiorari should be denied where no conflict among the Circuit Courts of Appeals exists and no important question of federal law is raised as a result of the Eleventh Circuit Court of Appeals' affirmance of the bankruptcy court's approval of a settlement of *ad valorem* tax obligations of the Miami Center Liquidating Trust?

PARTIES TO THE PROCEEDINGS

DEBTOR-PETITIONERS

Chopin Associates, acting by debtors Theodore B. Gouid and Miami Center Corporation,* its partners, and Miami Center Limited Partnership, acting by debtors Theodore B. Gould and Miami Center Corporation, its general partners

RESPONDENTS

Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust
Herbert Stettin, as escrow agent
S. Harvey Ziegler, as escrow agent
The Bank of New York
City National Bank of Florida, as trustee of Land Trust no. 5008793, Dade County, Florida
Joel Robbins, as Property Appraiser of Dade County, Florida
Fred Ganz, as Tax Collector of Dade County, Florida
Randall Miller, as Executive Director of the Florida Department of Revenue

COURTS

Judge Sidney M. Weaver of the United States Bankruptcy Court for the Southern District of Florida
Judge C. Clyde Atkins of the United States District Court for the Southern District of Florida
Judges Tjoflat, Fay and Hoffman of the United States Court of Appeals for the Eleventh Circuit**

*Miami Center Corporation is a wholly owned subsidiary of Debtor Holywell Corporation.

**Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

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*The statutes cited herein are reprinted in the appendix.

No. 90-761

in the
Supreme Court
of the
United States

October Term, 1990

**In re Holywell Corporation, Theodore B. Gould,
Miami Center Limited Partnership,
Chopin Associates and Miami Center Corporation,**

Debtors.

Chopin Associates, et al.,

Petitioners,

vs.

**Fred Stanton Smith, as Trustee of the
Miami Center Liquidating Trust, et al.,**

Respondents.

**BRIEF OF FRED STANTON SMITH, TRUSTEE
OF THE MIAMI CENTER LIQUIDATING TRUST,
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

OPINIONS BELOW

The opinions relevant to the Petition for Writ of Certiorari are the Order Approving Amended Settlement of *Ad Valorem* Tax Claims entered by the United States Bankruptcy Court for the Southern District of Florida on November 18, 1988, App. L at 72;¹ the Order Affirming Bankruptcy Court's Order Approving Amended Settlement of *Ad Valorem* Tax Claims entered by the United States District Court for the Southern District of Florida on July 6, 1989, App. G at 34; and the *per curiam* affirmance of the bankruptcy court's decision entered by the United States Court of Appeals for the Eleventh Circuit on August 14, 1990, App. F at 32.

STATEMENT OF JURISDICTION

The Petitioners seek review of the Eleventh Circuit's August 14, 1990 affirmance of the bankruptcy court's November 18, 1988 order approving a settlement of *ad valorem* property tax claims. The Petitioners have failed to establish any jurisdictional basis for granting the Petition for Writ of Certiorari. They have not demonstrated the existence of a conflict among the United States Courts of Appeals nor an important question of federal law which has not been, but should be settled by this Court. See Sup.Ct.R. 10.1(a)-(c).

¹References to the Petitioners' appendix will be by the symbol "App. ____." References to the appendix attached hereto will be by the symbol "Liquidating Trustee's App. ____."

STATEMENT OF THE CASE

The Petitioners are two of five related Debtors² who filed voluntary Chapter 11 petitions over five years ago in the United States Bankruptcy Court for the Southern District of Florida. This is their eighth attempt at review in this Court.³

In this petition, the Petitioners seek review of an order of the Eleventh Circuit Court of Appeals affirming the bankruptcy court's approval of a settlement of Dade County, Florida's *ad valorem* tax claims against the Miami Center. App. F. at 32 and L at 72. The Miami Center is a hotel, office, shopping and parking complex in Miami, Florida developed by the Petitioners and their Co-Debtors in the early 1980s, the foreclosure of which precipitated the Debtors' August 1984 voluntary Chapter 11 petitions. When they filed Chapter 11, the Debtors owed over \$350 million to over 400 creditors, with their most significant creditor being the Bank of New York (hereinafter "bank").

In August 1985, one year after the Debtors sought protection in the bankruptcy court, the court confirmed a plan of reorganization. Its central features were:

- (a) substantive consolidation of the five Debtors;
- (b) creation of the Miami Center Liquidating Trust, which consisted of, *inter alia*, all of the Debtors' assets as defined by Bankruptcy Code Section 541(a), the

²The Petitioner-Debtors are Chopin Associates and Miami Center Liquidating Partnership, which in turn are related to and/or controlled by Debtors Theodore B. Gould, Miami Center Corporation and Holywell Corporation.

³Of the other seven petitions, six have been denied and one, filed in October, 1990, is pending decision.

Miami Center, and *pending litigation*, including the *ad valorem tax lawsuits* then pending in state court;

- (c) appointment of a Liquidating Trustee to implement the plan;⁴
- (d) the purchase of the Miami Center by the bank for \$255.6 million, free and clear of liens, which figure was paid by the cancellation of the Debtors' obligations to the bank (approximately \$242 million), plus new cash of \$13.6 million;
- (e) the bank's release of approximately \$30 million in cash collateral to the Liquidating Trustee for payment of claims; and
- (f) subordination of Debtor-affiliated claims to Class 8 and subordination of the Debtors' claims to Class 9 under the plan.

The Debtors' appeal of the bankruptcy court's August 8, 1985 confirmation of the plan was unsuccessful. *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), dismissed *sub nom*, *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), cert. denied, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). When the Debtors failed to post a supersedeas bond, the plan was implemented on October 10, 1985 with the sale of the Miami Center to the Bank of New York. The plan has since been substantially consummated. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d at 1552, 1554-55.

⁴Fred Stanton Smith was appointed trustee of the Miami Center Liquidating Trust on August 12, 1985 after confirmation of the plan. No party appealed this order.

As of the date of closing on the sale of the Miami Center to the Bank of New York, there remained pending in the state court a number of *ad valorem* tax protest suits initiated by the Debtors for each year dating back to 1979.

The Petitioners assert that Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust (hereinafter "Liquidating Trustee") was not a party to the state court *ad valorem* tax protest suits pending at confirmation of the plan. Under the plan, however, he stepped into the Debtors' shoes and acquired their rights concerning those cases.

The plan and the closing documents from the sale of the Miami Center required the Liquidating Trustee to escrow a portion of the sale proceeds sufficient to pay the disputed *ad valorem* taxes.⁵ App. G. at 35-36. An escrow was established in 1985 with the Liquidating Trustee's then counsel, Holland & Knight, and negotiations for settlement continued. Thereafter, Herbert Stettin became the Liquidating Trustee's attorney and, on February 4, 1988, the bankruptcy court named Herbert Stettin and the bank's attorney, S. Harvey Ziegler, as substitute escrow agents of the fund previously held by Holland & Knight.⁶

⁵The Petitioners argue that the plan required the taxes to be paid at the closing, and that the post-confirmation modification to the plan, which provided for the escrow of monies for the payment of *ad valorem* taxes, was improper. This modification did not violate the Bankruptcy Code in any way. In any event, the Petitioners can hardly argue in good faith that the trust was harmed by the escrow of monies for the payment of *ad valorem* taxes as the escrow permitted the continuation of the *ad valorem* tax protest suits, which resulted in substantial savings to the Liquidating Trust. Prior to this modification, the plan required the Liquidating Trustee to pay the taxes upon closing of the sale of the Miami Center.

⁶The Debtors' appealed this order to the district court, which dismissed the appeal, *Holywell Corp. v. Smith*, No. 88-0628 slip op. (S.D. Fla. January 30, 1989). The Debtors argued that the bankruptcy court

(Footnote continued on next page)

On March 1, 1988, two and one-half years after confirmation and several weeks before the Liquidating Trustee initially sought the court's approval of the tax settlement, the Debtors filed an adversary complaint in the bankruptcy court in which they sought by declaratory decree the same relief they later sought in their objections to the settlement: that is, to have the *ad valorem* tax claims of Dade County stricken based on the county's failure to file proofs of claim in the Chapter 11 proceedings. App. H at 45. Prior to filing this adversary complaint, the Debtors had actively participated in settlement negotiations with the county concerning payment of the *ad valorem* taxes. The bankruptcy court dismissed the adversary complaint on November 18, 1988 after approving the tax settlement. *Chopin Associates v. Smith*, No. 88-0117 slip op. (Bankr. S.D. Fla. November 18, 1988); App. L at 82.

On March 23, 1988, the Liquidating Trustee filed a motion in the bankruptcy court seeking approval of a settlement of the *ad valorem* property taxes. App. I at 59. Although the bankruptcy court indicated that it would approve the terms of the compromise in general, it denied the motion without prejudice because the compromise required the Miami Center Liquidating Trust to pay post-petition interest on the tax debt.

(Footnote continued from previous page)

lacked jurisdiction to approve the transfer of the escrowed funds because confirmation of the plan terminated the bankruptcy proceedings. The court found "this argument completely without merit", based on 11 U.S.C. Section 945, Bankruptcy Rule 3020(d) and the plan's reservation of jurisdiction. *Id.* at 2. The Debtors then appealed to the Eleventh Circuit, which also dismissed the appeal, *Holywell Corp. v. Smith*, No. 89-5165 slip op. (11th Cir. November 1, 1989). In addition to naming Stettin and Ziegler escrow agents, the order determined that the funds held in escrow were specifically set aside to pay the *ad valorem* property taxes on the Miami Center.

On October 4, 1988, the Liquidating Trustee entered into a new settlement agreement with Dade County and the Bank of New York which did not require the Liquidating Trustee to pay post-petition interest. App. K at 68. It was more financially favorable to the Liquidating Trust.

At the October 31, 1988 hearing on the Liquidating Trustee's motion for approval of the amended tax settlement, the Liquidating Trustee requested the court to take judicial notice of all of the testimony, exhibits and arguments presented at the April 28, 1988 hearing. No party objected and the court granted the motion.

At that April 28, 1988 hearing, the bankruptcy court heard testimony from John Fletcher, an attorney specializing in *ad valorem* tax matters. He testified without contradiction that the burden of proof in *ad valorem* tax disputes in Florida is upon the taxpayer to prove, to the exclusion of every reasonable hypothesis of value used by the tax assessor (using recognized methods of valuation), that there was an error in the assessment. He said that is an exceedingly difficult burden of proof to sustain. Liquidating Trustee's App. A at 1-2. He also testified that, given the actual sale of the property in October, 1985 for \$255.6 million, together with an MAI appraisal for that amount, the difficulties in the tax protest litigation facing the Liquidating Trustee were obvious. *Id* at 3.

A.H. Blake, the former tax assessor for Dade County and an expert in *ad valorem* tax matters, testified that the settlement was fair, reasonable and in the best interests of the trust. *Id.* at 4-5. The Liquidating Trustee, who is himself an experienced businessman and real estate broker, testified the settlement was in the best interest of the trust because it would (a) terminate the multiple tax protest lawsuits pending in state court, (b) prevent exposure of the trust to judgments in favor of the county for substantially more than

the settlement agreement, (c) preserve to the Debtors the right to pursue their claim that the county is time-barred for failure to file a proof of claim, and (d) terminate the attorneys' fees and costs involved in litigating the state court tax actions. *Id.* at 8-9.

Frank Jacobs, the assistant property appraiser for Dade County, testified that the county was aware of the risks at issue and that the settlement agreement was in no way structured to favor the Bank of New York over the trust. *Id.* at 12.

The bankruptcy court also heard testimony from Debtor Theodore B. Gould regarding the alleged interest of St. Joe Paper Company to a tax refund. In 1979, the Debtors purchased the unimproved property on which the Miami Center was built from St. Joe Paper Company. Mr. Gould conceded that he could not produce any written agreement concerning a continuing ownership interest of St. Joe Paper Company to a tax refund for overpayment of 1979 *ad valorem* property taxes. *Id.* at 13-16. While one of the tax protest suits was in the name of St. Joe Paper Company, the company had given Mr. Gould full authority to pursue the matter and both the bankruptcy court and the district court found there was no evidence that St. Joe Paper Company had any continuing interest in a tax refund. App. G. at 40; L at 75-76.

In its Order approving Amended Settlement of *Ad Valorem Tax Claims*, the bankruptcy court found that the issue regarding tax years 1979 through 1981 concerned refunds based on claims of over-assessment. The court further found that, in exchange for the Liquidating Trustee's waiver of his claim for refunds for tax years 1979-81, the county waived its claims for additional taxes for the Metro-Dade People Mover (public transportation) and other special assessments. App. L at 76.

The bankruptcy court further found that the issue regarding 1983 taxes was whether the office building at the Miami Center was substantially completed as of January 1, 1983, the date of valuation. The county conceded, for purposes of the settlement, that the building was not substantially completed, and the bankruptcy court found that this concession resulted in considerable savings to the trust. *Id.*

The bankruptcy court also noted the dispute for tax years 1984 and 1985 concerned the reasonableness of the assessment of the property. The court found the settlement adjusted the assessments for those years greatly in favor of the trust (by some \$90 million), particularly for 1985, the year the Bank of New York's designee purchased the property for \$255.6 million, a price consistent with an MAI appraisal of the property. *Id.*

In approving the settlement, the bankruptcy court took into account the fact that the trust would avoid exposure of substantial additional tax and interest, and would receive between \$400,000 and \$500,000 back from the Bank of New York, representing a reparation of the 1985 taxes taken as a credit by the bank at the closing on the sale of the Miami Center. As part of the settlement the bank agreed to pay interest to the trust on this rephrased sum. *Id.* at 78-79.

The bankruptcy court expressly noted that the amended settlement did not require the trust to pay post-petition, pre-confirmation interest on the sums due the county as the original settlement proposal did, and that the trust would therefore pay \$3,320,883.07 instead of \$3,430,753.97, which was the original settlement sum. The Liquidating Trust agreed this sum would draw interest in favor of Dade County from April 1, 1988 until paid. *Id.* Almost double this amount had been placed in escrow in 1985 to pay these taxes.

The bankruptcy court "recognized the complexity of all of the issues involved, the length of time required to resolve all of these issues, the expense involved in resolving all of these issues, the uncertainty of result, and the potential devastating effect an adverse ruling would have upon the liquidating trust and its ability to pay claims to creditors and return the surplus to debtors." *Id.* at 81. The bankruptcy court further determined that the settlement agreement is an "exercise of business judgment which appears to the [c]ourt to be sound, reasonable and practical. It recognizes a large savings in tax to the liquidating trust, it permits the debtor, by appeal only, to continue its attempt to invalidate the tax claims in their entirety . . . and it assists in the orderly completion of the work to be done in ending this case." *Id.* The bankruptcy court approved the settlement agreement and the Debtors appealed.

The district court affirmed the bankruptcy court's approval of the settlement, noting that the "bankruptcy court conducted a searching *Jackson* [*In the Matter of Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980)] inquiry, and it approved the proposal only after the proceedings yielded a welter of evidence bearing on the propriety of the settlement." App. G at 38.

The Eleventh Circuit affirmed on August 14, 1990, in a brief opinion:

The bankruptcy court had the authority to consider the settlement reached between the parties and Dade County concerning questions surrounding outstanding ad valorem property taxes and did not abuse its discretion in approving the settlement.

AFFIRMED.

App. F at 33. This Petition for Writ of Certiorari followed.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied. The Petitioners attempt to create conflicts among the Circuit Courts of Appeals where none exist. They also claim there is an important question of federal law concerning the necessity of filing proofs of claims in bankruptcy proceedings. There is none and they failed to raise this issue adequately below. The Liquidating Trustee's position concerning the uncertainty in the law because of the failure of the county to file a proof of claim is that it was a further incentive to settle. In any event, the Eleventh Circuit's application of *Matter of Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980) in determining whether to approve the compromise was entirely proper. It was not applied inconsistently or in derogation of *Matter of AWEKO, Inc.*, 725 F.2d 293 (5th Cir.), cert. denied, 469 U.S. 880 (1984) or *In re American Reserve Corp.*, 841 F.2d 159 (7th Cir. 1987), as the Petitioners contend. Any claimed inconsistency is entirely manufactured and does not warrant the granting of the Petition for Writ of Certiorari.

ARGUMENT

I.

THE PETITIONERS HAVE FAILED TO ESTABLISH ANY BASIS FOR THIS COURT'S CERTIORARI JURISDICTION

The Petitioners have not met any of the recognized grounds governing review by certiorari as set forth in Rule 10 of the Supreme Court Rules. The considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered." Sup.Ct.R. 10.1. The Petitioners have failed to demonstrate that they meet any of the established criteria. See Sup.Ct.R. 10.1 (a)-(c).

A.

The Bankruptcy Court Properly Applied the Recognized Standards for Approving Settlements in Bankruptcy Proceedings

The Petitioners' contention that the bankruptcy court's application of the standards utilized by courts in approving settlements in bankruptcy proceedings conflicts with the Fifth Circuit's decision in *Matter of AWEKO, Inc.* and the Seventh Circuit's decision in *In re American Reserve Corp.* is without merit. The bankruptcy court's application of these standards, set forth in *Matter of Jackson Brewing Co.*, was entirely proper and consistent with *AWEKO* and *American Reserve*.

In determining whether to approve a compromise, the bankruptcy court "must compare the terms of the compromise with the likely rewards of litigation." *Protective Committee for Independent Stockholders of T.M.T. Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 425, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1, 10 (1968); *In re Jackson Brewing Co.*, 624 F.2d at 607. The court must evaluate the probable "success in litigation, with due consideration for the uncertainty in fact and law." *Id.* (emphasis supplied). The court must also consider the complexity, duration, and expense of litigation, as well as "all of the factors bearing on the wisdom of the compromise." *Id.* The Debtors have failed to prove the bankruptcy court abused its discretion in applying these standards.

1. Uncertainty of the law

The Petitioners argue that the bankruptcy court could not approve any settlement of *ad valorem* property taxes without first determining whether the county's failure to file proofs of claim for pre-petition tax obligations precludes the county's right to receive payment of any taxes, citing

AWEKO and *American Reserve*. This argument is without merit, for one of the primary reasons for settling was because of the uncertainty of the law governing whether the county had a duty to file proofs of claims. In paragraph 21 of the bankruptcy court's order, the court specifically considered "the uncertainty of result and the potential devastating effect an adverse ruling would have upon the liquidating trust and its ability to pay claims to creditors and return the surplus to the debtors." App. L at 81. The district court also noted the uncertainty of the law surrounding the county's duty to file proofs of claims. The court determined that "[a]t best, then the appellants' argument raises a novel issue of law that has not been decided in this circuit — it hardly proves that the omnibus settlement was unfair, inequitable, or not in the estate's best interests. Compare *In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (11th Cir. 1985) (court addresses distinct question dealing with adequacy of filing)." App. G at 41-42.

The Petitioners cite *In re American Properties, Inc.*, 30 Bankr. 239 (Bankr. D. Kan. 1983), to support their claim that the bankruptcy court erred in approving the settlement because the county failed to file proofs of claim. While that case does stand for the proposition that a non-consensual lienholder must file a proof of claim, 30 Bankr. at 247, the Petitioners have neglected to cite the cases which hold that a non-consensual lienholder is *not* required to file a proof of claim. See *In re Hebert Systems, Inc.*, 61 Bankr. 44 (Bankr. W.D. La. 1986); *In re Atoka Agr. Systems, Inc.*, 39 Bankr. 474 (Bankr. E.D. Va. 1984); *Kinder v. Superior Court of Los Angeles County*, 178 Cal. Rptr. 57, 125 C.A. 3d 308 (Cal. Ct. App. 1981). The Eleventh Circuit has never ruled on this issue. Obviously then the question is uncertain and, as the district court held, "it hardly proves that the omnibus settlement was unfair, inequitable, or not in the estate's best interests." App. G at 41.

Moreover, even if the county was required to file proofs of claims, the Liquidating Trustee would still have to pay the *ad valorem* property taxes in order to convey the Miami Center to the Bank of New York free and clear of all liens, as required by the plan. See *Estate of Lellock v. The Prudential Ins. Co. of America*, 811 F.2d 186, 187-88 (3d Cir. 1987) (lien against property survives discharge of debt). Yet the Petitioners nonetheless argue that approval of the compromise was inconsistent with the Fifth Circuit's *AWEKO* decision and the Seventh Circuit's *American Reserve* decision.

In *AWEKO*, the issue was "in the period prior to confirmation of a reorganization plan, must the bankruptcy court apply the fair and equitable standard in considering a priority creditor's objections to a settlement?" 725 F.2d at 298. The issue in the instant case was whether, post-confirmation, the bankruptcy court could approve a settlement that was favorable to the trust and where the duty of the county to file a proof of claim in order to protect its right of payment was uncertain.

There are several other important facts which distinguish *AWEKO* from this proceeding. In *AWEKO*, the settling creditor was a recognized general unsecured creditor and the objecting creditor was secured. In fact, the settlement required the transfer of property to the unsecured creditor that was subject to the secured creditor's claim. In this case, one of the issues was whether Dade County was a priority claimant. The objecting Petitioners are accorded the lowest priority of payment under the confirmed and substantially consummated plan. In this case, the compromise was based in part on the uncertainty of the law of whether Dade County's tax claims were barred, whereas in *AWEKO*, all parties acknowledged that the settling creditor was a general unsecured creditor. Further, in *AWEKO*, although the plan was filed, it had never been

presented to creditors or submitted to the court for confirmation. In this case, not only was the plan confirmed and substantially consummated, but the plan required the Liquidating Trustee to convey the property to the Bank of New York free and clear of the county's tax liens. Clearly then, *AWEKO* is inapplicable.

The Petitioners' reliance on *American Reserve* fares no better. In that case, the Seventh Circuit reversed and remanded the bankruptcy court's approval of a \$5,000 settlement on a claim of \$79,350 for further findings where the bankruptcy court's only findings and conclusions were that the settlement was in the Chapter 7 estate's best interest. 841 F.2d at 161. The court opined that because claims with different priorities have different settlement values, the bankruptcy court should "examine the relative priorities of the contested claim and the estate's other claims." *Id.* As previously stated, in this Chapter 11 case, one of the grounds for settling was to avoid a lengthy and expensive battle on the issue of the county's right to claim taxes after not having filed formal proofs of claims where the law on this question is unsettled, and where the plan nonetheless requires the taxes to be paid. The Seventh Circuit's criticism in *American Reserve* was clearly aimed at the bankruptcy court's failure to make any findings that would demonstrate the exercise of its discretion. 841 F.2d at 162-63.

In their zeal, the Petitioners also fail to address the fact that even though Dade County did not file timely formal proofs of claim, their filings with the court could arguably be deemed an enforceable *informal* proof of claim. See *The Charter Co. v. Dioxin Claimants (In re The Charter Co.)*, 876 F.2d 861, 864-66 (11th Cir. 1989) (In order to constitute an informal proof of claim, document must apprise the court of the existence, nature and amount of claim, and evidence intent to hold the debtor liable); *In re South Atlantic*

Financial Corp., 767 F.2d 814, 817 (11th Cir. 1985); *Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1381-82 (9th Cir. 1985); *In re Sambo's Restaurants, Inc.*, 754 F.2d 811, 815 (9th Cir. 1985).

The Petitioners have not demonstrated either the existence of a conflict among the courts of appeals or that the bankruptcy court incorrectly applied the law governing approval of settlements in bankruptcy proceedings.

2. Complexity, duration and expense of litigation

The bankruptcy court also considered the complexity, duration and expense of litigation, and concluded that it was in the best interests of the Miami Center Liquidating Trust to settle rather than to continue to litigate. App. L at 81-82.

3. Wisdom of the compromise

The bankruptcy court likewise considered the factors bearing on the wisdom of the compromise:

The Court believes it has done so, and it recognizes the benefits which flow to each of the parties involved. The taxing authorities receive a substantial amount of cash and an end to time consuming and expensive litigation on their part. The Bank of New York receives property free of any further claims by the taxing authorities, and the debtors receive a resolution of County tax claims on excellent terms.

App. L at 81-82.

B.

The Bankruptcy Court Had Jurisdiction to Approve the Ad Valorem Tax Compromise

The bankruptcy court, contrary to the Petitioners' claims, had jurisdiction to approve the compromise.

The Debtors' argument that the bankruptcy court lacked jurisdiction to approve the settlement of the state court *ad valorem* property tax lawsuits, while novel, is meritless. The bankruptcy court's jurisdiction to approve a settlement of litigation directly affecting the Miami Center Liquidating Trust is obvious and well settled.

The Debtors' first claim that the bankruptcy court lacked jurisdiction because it granted the Debtors relief from the automatic stay in order to pursue the state court litigation. This argument misconstrues the meaning of relief from the automatic stay.

Relief from the automatic stay to pursue a state court lawsuit does not preclude the parties from settling the matter rather than seeking the state court's final judgment. *Peck v. Jenness*, 7 How. 612 (1849), relied on by the Debtors, does not change the result. *Peck* holds that a court cannot interfere with proceedings in another court of competent jurisdiction. 7 How. at 625. The bankruptcy court did not interfere with the proceedings in the *ad valorem* tax cases. The parties to those lawsuits settled the claims, and then sought the bankruptcy court's approval. Once a settlement proposal is reached the bankruptcy court must determine whether the compromise is in the best interests of the trust. See *In re Matter of Jackson Brewing Co.*; 11 U.S.C. Section 9019. Moreover, public policy favors settlement over lengthy, expensive litigation. See *Chopin Associates v. Smith*, No. 89-0070 slip op. (S.D. Fla. July 6, 1989) (Order

Affirming Bankruptcy Court's Order Approving Amended Settlement of Ad Valorem Tax Claims); App. G at 38.

The Debtors also overlook the fact that the confirmed plan of reorganization provides the bankruptcy court with post-confirmation jurisdiction to enter any order necessary or appropriate to carry out the terms of the plan. See also 11 U.S.C. Sections 945, 3020(d). As the plan required payment of the *ad valorem* taxes,⁷ the order approving the compromise was well within the bankruptcy court's power.

The Debtors also claim the bankruptcy court lacked authority to approve the settlement reached by the Liquidating Trustee because the Bankruptcy Code does not provide for the appointment of a Liquidating Trustee. Not only do the Debtors ignore the confirmed plan (which provides for the appointment of a liquidating trustee), but they also misconstrue the status of the Liquidating Trustee and the scope of his authority. The Debtors argue that the Liquidating Trustee was appointed without satisfying the statutory requirements of 11 U.S.C. Section 1104(a). Yet this contention ignores the fact that the plan provides for the appointment of a trustee to administer a trust composed of the Debtors' assets. The plan also expressly provides that the Liquidating Trustee is the successor to the Debtors' pending litigation.

Because the Debtors have exhausted whatever rights they had to review the order of confirmation, that plan is the law of the case and the Debtors' contentions are an impermissible and frivolous collateral attack. See *Miami Center Limited Partnership v. Bank of New York*. This plan is binding on the Debtors. See *In re Blanton Smith Corp.*, 81 Bankr. 440 (Bankr. M.D. Tenn. 1987); *In re Sanders*,

⁷The plan required the Liquidating Trustee to convey the Miami Center to the bank's designee free and clear of all liens, including *ad valorem* tax liens.

81 Bankr. 496 (Bankr. W.D. Ark. 1987); *In re Monroe Well Service, Inc.*, 80 Bankr. 324 (Bankr. E.D. Pa. 1987); *In re Jartran, Inc.*, 76 Bankr. 123 (Bankr. N.D. Ill. 1987); *In re St. Louis Freight Lines*, 45 Bankr. 546 (Bankr. E.D. Mich. 1984). The validity of the Liquidating Trustee's appointment, his authority to settle litigation, and the bankruptcy court's post-confirmation jurisdiction are thus firmly established.

C.

**The Petitioners' Remaining Arguments
are Meritless**

The Petitioners' remaining arguments are not only lacking in any recognized factual or legal basis, but are entirely irrelevant for purposes of determining whether certiorari should be granted.

1. Income Taxes

The Petitioners argue that the "purpose of the establishment of an escrow, segregating the funds for the payment of the real property taxes, was . . . to provide a legal basis for the undisputed fact that the liquidating plan did not provide a basis for the payment of income taxes arising from the sale of the insolvent debtor MCLP's property." Petition for Writ of Certiorari at 12-13. (Emphasis and footnotes deleted). The Petitioners further argue that:

Section 1129(d) provides, in relevant part, that a court may not confirm a plan "if the principal purpose of the plan is the avoidance of taxes," and Section 1129(a)(3) requires that the plan be proposed in good faith and not by any means forbidden by law. The Feasibility Standard, Section 1129(a)(11), required that the bankruptcy court

assure itself that confirmation of the plan was not likely to be followed by the need for further financial reorganization of the debtors, that reorganization would succeed, and therefore, in accordance with the Bankruptcy Reform Act's legislative history, the debtors' "fresh start" would not be burdened with the responsibility for the payment of income taxes arising from the sale of the insolvent MCLP's property and the United States would not lose taxes which the Internal Revenue Service had not had a reasonable time to collect.

The Eleventh Circuit's opinion that the bankruptcy court did not abuse its discretion in approving the settlement for the payment of disputed real estate taxes for the purpose of discharging statutory liens on the property and that the confirmed plan made no provision for the payment of income taxes arising from the sale of the insolvent debtor MCLP's property precludes the conclusion that the confirmed plan was fair and equitable to the United States.

Petition for Writ of Certiorari at 15-16 (footnotes deleted). This argument is improper and irrelevant.

On September 18, 1990, the Eleventh Circuit held the Miami Center Liquidating Trust was not responsible for filing income tax returns or paying income taxes due, if any, on the sale of the Miami Center and what has been referred to as the Washington properties. *United States v. Smith*, No. 89-5862 slip op. (11th Cir. Sept. 18, 1990). While the Debtors have filed a petition for rehearing *in banc*, the United States has not. The petition for rehearing is pending.

It is remarkable that the Petitioners would seek to circumvent the Eleventh Circuit's authority to rule on the Petitioners' petition for rehearing by arguing as they have in the Petition for Writ of Certiorari. It is even more remarkable that the Petitioners would seek to circumvent the Supreme Court Rules governing petitions for writs of certiorari by arguing the Eleventh Circuit's income tax issue in this proceeding. It is entirely improper.

In addition to being an improper argument, it is irrelevant to the issue before the Court. The Petitioners' argument is apparently in two parts: (1) that the bankruptcy court abused its discretion in approving the *ad valorem* tax settlement because the purpose of the settlement was to discharge statutory liens, and (2) the plan of reorganization should not have been confirmed because the plan did not provide for the payment of allegedly due federal income taxes, thus the plan was not fair and equitable to the United States. In a footnote to the second half of this argument, the Petitioners erroneously contend that the Eleventh Circuit affirmed the district court's reversal of the entire plan of reorganization. Petition for Writ of Certiorari at 16, n. 23. Each of these arguments is wholly baseless.

In response to the first half of this argument, it has been pointed out that the confirmed plan included the Miami Center property as an asset of the Miami Center Liquidating Trust and required the trust to convey the property to the Bank of New York for \$255.6 million, *free and clear of liens*. At the time of the conveyance, October 10, 1985, there were pending *ad valorem* tax protest suits concerning the property in state court for each year going back to 1979. Unless modified, the plan would have required the trust to pay these taxes in order to convey the property free and clear of liens. Instead, to the benefit of the trust, the plan was modified to allow the trust to escrow a portion of the sale proceeds for the payment of *ad valorem* taxes so the

trust could pursue the state court tax protest suits and continue settlement negotiations. There was no devious attempt to discharge statutory liens which attached to the property.

In response to the second half of the Petitioners' argument, the Eleventh Circuit has affirmed the bankruptcy court's determination that the trust is not responsible for claimed federal income because (a) the plan does not provide for the payment of such taxes, (b) it would be an unlawful post-confirmation modification to the plan to do otherwise, and (c) 26 U.S.C. Section 6012(b) does not apply to the Miami Center Liquidating Trust. The Eleventh Circuit's opinion is reprinted in the Petitioners' appendix. See App. E at 13. While the Petitioners and their Co-Debtors have filed a petition for rehearing *in banc*, the United States has not. In any event, this issue is entirely irrelevant to the issue of whether this Court has jurisdiction to review the Eleventh Circuit's affirmance of the bankruptcy court's approval of the *ad valorem* tax compromise.

Lastly, Petitioners' footnote 23 deserves comment. The Petitioners contend the Eleventh Circuit has recently affirmed the district court's reversal of the bankruptcy court's order confirming the plan. In fact, the Eleventh Circuit dismissed as moot the Petitioners' challenge to the plan of reorganization. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), cert. denied, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). The district court's opinion to which the Petitioners refer in footnote 23 was *limited* by its own terms to the plan's classification of the claim on a non-debtor, Miami Center Joint Venture. In the Petitioners' effort to argue that this decision is broader than it is, they neglect to supply the Court with a copy of the opinion. A copy of the district's court's decision reversing the priority accorded the claim of Miami Center Joint Venture under the plan is reprinted in

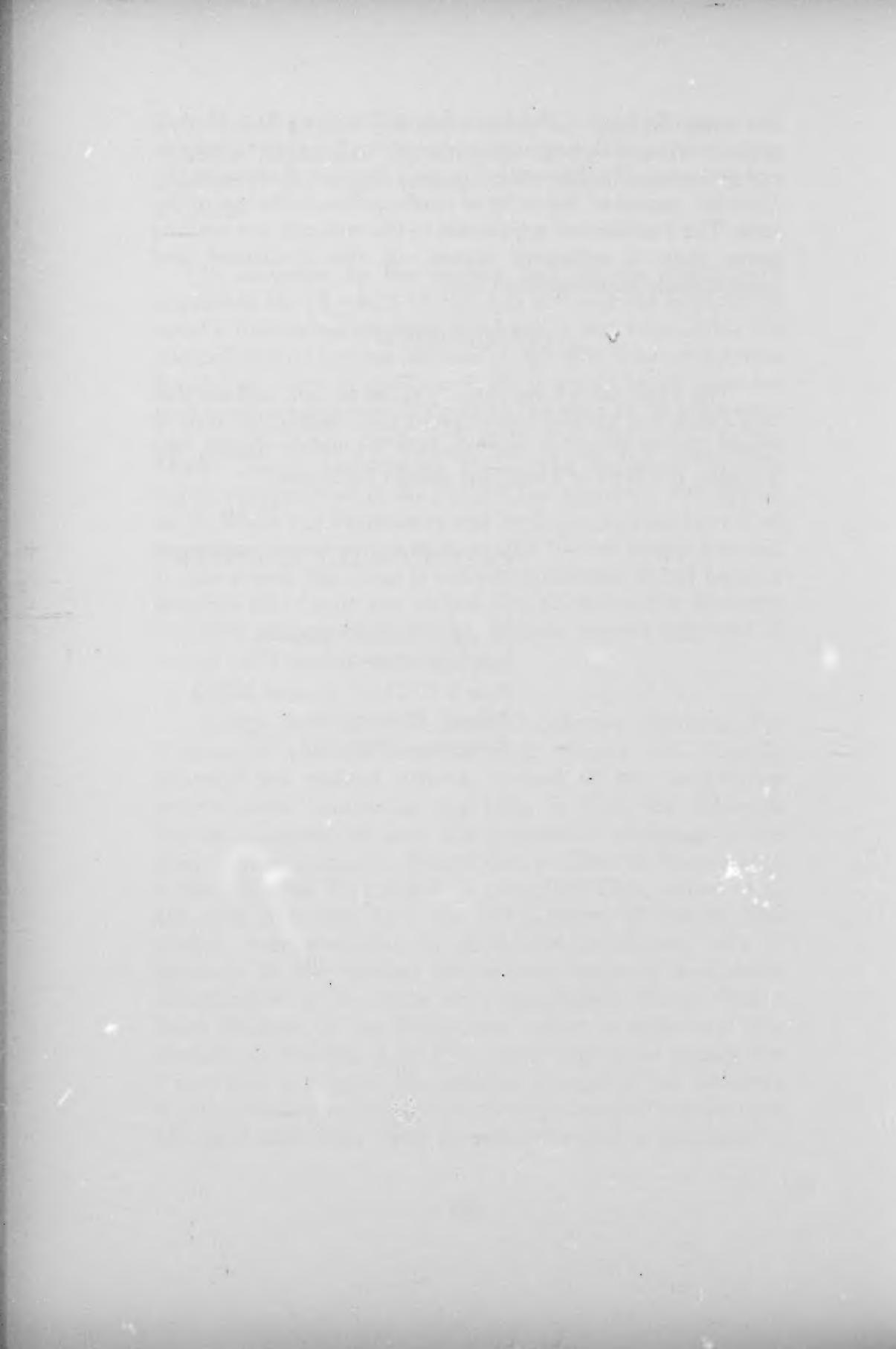
the appendix hereto. See Liquidating Trustee's App. B. As a plain reading of this opinion makes clear, the entire plan was not reversed. The Eleventh Circuit's decision dismissing the Debtors' appeal of the order of confirmation is the law of the case. The Petitioners' arguments to the contrary are nothing more than a collateral attack on the confirmed and substantially consummated plan.

CONCLUSION

The Petitioners have entirely failed to demonstrate that this Court has jurisdiction to grant the Petition for Writ of Certiorari. For all of the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,

Herbert Stettin, Esquire
Herbert Stettin, P.A.
One S.E. Third Avenue #2215
Miami, Florida 33131
Telephone (305) 374-3353

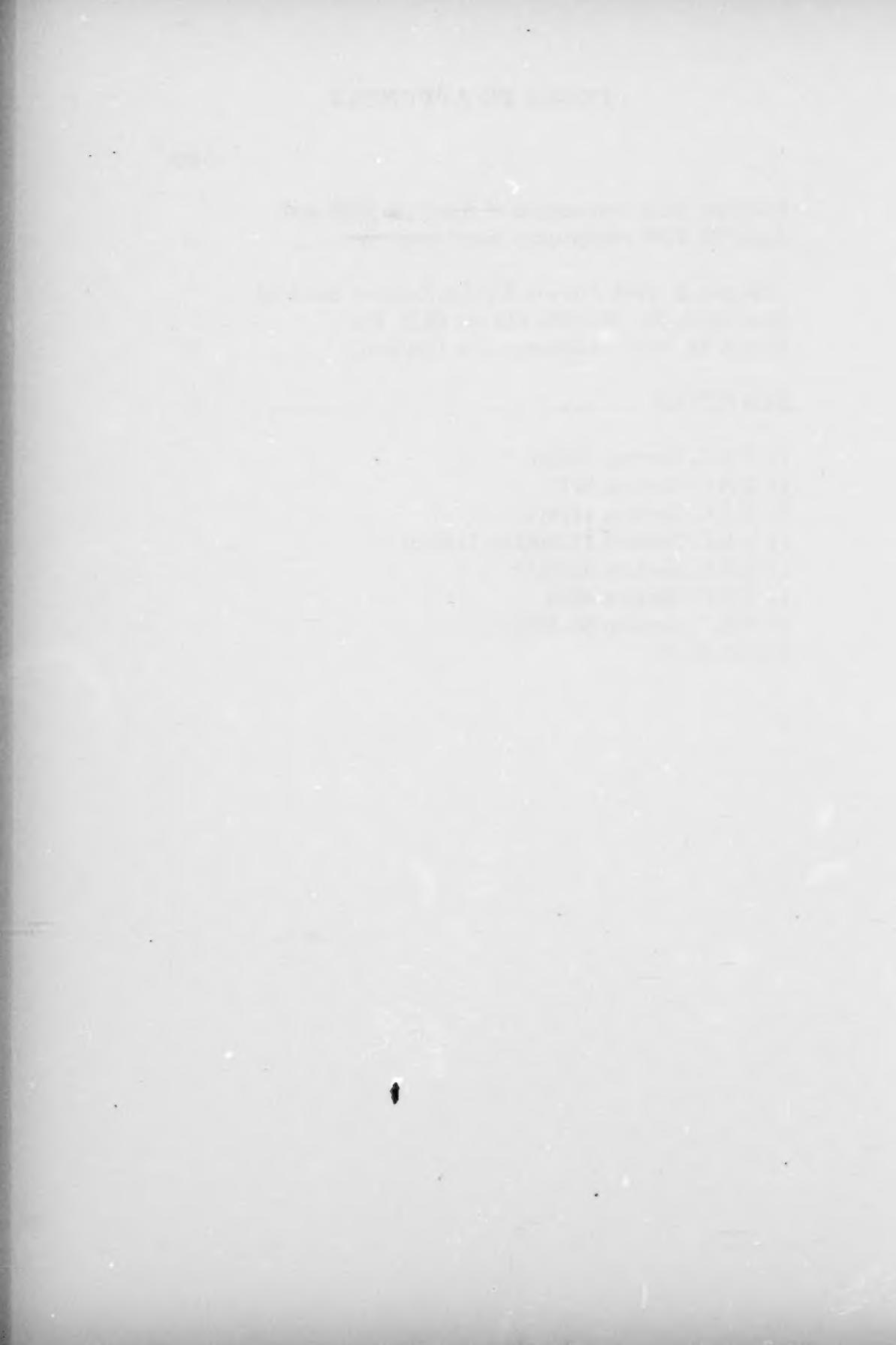


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APPENDIX A

Testimony of John Fletcher:

* * *

the taxpayer was represented by Lapidus & Frankel and Richard L. Lapidus.

Q. Do you consider Mr. Lapidus to be a competent assessment lawyer?

A. Yes, sir.

Q. What was the result in that case?

A. In the Hotelrama case, the Third District Court of Appeals determined that taxpayers, even though he felt he had a better valuation method and proved that it was a better valuation method, if we can accept that, lost the case, as long as he failed to carry his burden under the three tests of valuation.

Q. What did the Court establish as the burden imposed upon a taxpayer who contests an assessment of ad valorem taxes?

A. Well, it echoed — I won't say that case established it but it echoed [sic] the burden of proof that has been on the taxpayer for a good number of years.

Q. What is that?

A. What that is is that the taxpayer must show that the assessment is invalid by excluding all reasonable hypotheses of assessments.

Q. Does that mean if the tax assessor can show one basis for the assessment, one reasonable basis, even if there are other more reasonable bases, ten other more reasonable bases, the assessor wins?

A. Basically, yes, and if I could explain, the hypotheses of assessments generally are those appraisal methods that are accepted in the appraisal industry, if that is the right word. Those are the cost approach, the income approach, and the market or comparable sales approach. If the property appraiser has evidence showing that any one of those proves his point, then the taxpayer loses.

Q. I ask you to assume as a fact in this case that in 1985, there were one or more M.A.I. prepared assessments of the property which is the subject of this case.

THE COURT: Do you have any problem with the witness being termed an expert in his field?

MR. MARK: I have no problem with his expertise in this area. I have a problem with the relevance of his testimony to any of the issues before the Court.

THE COURT: Well, let's do one thing at a time.

I will accept him.

MR. STETTIN: Thank you, sir.

BY MR. STETTIN:

Q. I ask you to assume for this question that the property in question was appraised one more time in 1985 by an M.A.I., Charles Failla for one, who found the value of the property to be in excess of \$255 million.

I also ask you to assume as a fact in this case that the property was sold pursuant to a confirmed amended plan of reorganization for \$255,600,000.

Sir, would either or both of these facts constitute a basis for the tax assessor to use in valuing the property?

A. I would assume that we are talking about a fair market value appraisal by the appraiser and an arm's length transaction in the sale.

Q. I ask you to assume both of those.

A. Under those circumstances, that definitely would be very substantial if the property appraiser were to use that figure.

MR. STETTIN: I have nothing further on direct.

MR. MARK: Robert Mark on behalf of the Miami Center Limited Partnership, one of the parties objecting to the settlement.

* * *

Testimony of A.H. Blake:

MR. STETTIN: I will submit it is.

BY MR. STETTIN:

Q. What instructions did you get from me?

A. Well, what you essentially told me was to see what I can do because this thing is getting out of hand.

Q. What do you mean by getting out of hand?

A. Well, the total potential exposure when I entered the picture to the liquidating trustee was in excess of \$10 million, of which almost \$3 million was just interest.

THE COURT: I guess the question should be, if Mr. Stettin said that, what he meant by getting out of hand?

BY MR. STETTIN:

Q. What did I mean by getting out of hand?

A. I think we had discussed this as a very real problem because interest was running at the rate of about \$78,000 a month.

Q. Were you able to come to a resolution with this preliminary agreement with the Dade County Tax Assessor's Office for a settlement of all of the years?

A. Yes, and I think that it's a very fair one.

* * *

Q. You heard Mr. Mark question John Fletcher before.

Do you know whether the property, that is the Miami Center property, has increased in value in the years 1986 and 1987?

A. No, I do not.

Q. Do you have an appraisal that was made subsequent to that? I don't mean the Failla update, I mean other than that, showing the present value of that property?

A. Yes, sir.

Q. What is the present value pursuant to the most recent appraisal that you know?

A. In June of '87, it was said to be \$170 million.

Q. Who was that?

A. Joseph J. Blake & Associates, no relation.

Q. Sir, do you have an opinion as to whether or not the settlement proposed is in the best interest of the estate?

A. Yes, I do, and I think it is.

Q. What is the opinion first?

A. I think it's in the best interest.

Q. Why?

A. To win an ad valorem tax case is pretty near impossible, provided the assessor has done what the law tells him to do. The potential risk here is \$10,500,000. The agreed settlement is like \$6,140,000. It's a difference of \$4.4 million.

It's kind of having — it's kind of knowing when to hold them and when to fold them.

MR. STETTIN: Excuse me for one second, Your Honor.

THE COURT: Certainly.

MR. STETTIN: No further questions.

* * *

THE COURT: Any other questions from this side?

MR. GOULD: No.

THE COURT: These were not introduced?

MR. MARK: I have got my copies.

Your Honor, if you would, I will leave that set with you and I will move them into evidence at the appropriate time.

MR. ZIEGLER: Just a couple questions, Your Honor.

THE COURT: Proceed.

CROSS EXAMINATION

BY MR. ZIEGLER:

Q. Mr. Blake, you have testified about the use of three approaches on reaching the value of property, cost, market and income; is that correct?

A. Yes, sir.

Q. Are these approaches weighted in valuing property dependent upon the individual properties?

In other words, some property it makes more sense to use, to have more heavily weight the cost basis and in some property more heavily weight the income basis?

A. It was pretty much up to the assessor's discretion, provided that he has at least given serious consideration to whichever approach he excludes.

Q. Does the income approach have much weight in a situation where you are dealing with more or less loss? In other words, where you are dealing with the difference between two negative numbers, it lost \$5 million in year one, and it only lost \$500,000 in

* * *

claim filed?

A. Absolutely not.

Q. Did you agree as part of your settlement discussion that you would agree that you would not raise the objection that no claim had been filed, therefore no right to payment should exist?

A. That is correct.

Q. The County understood that, that Mr. Gould still had the right to raise that issue; isn't that right?

A. Yes.

Q. Were you also made aware of the fact that the County claims interest as part of this settlement amount, they allocate a portion of the monies to interest?

A. Yes.

Q. Did you have discussion with your lawyer concerning whether or not interest was enforceable post-petition against the liquidating trust?

A. Yes.

Q. Did you have a concern about that fact?

* * *

Testimony by Fred Stanton Smith:

liquidating trust.

Q. And if there is more than enough to pay all of the creditors whose claims exist and the administrative expenses, what will happen to the excess?

A. It goes back to the residual interest, Mr. Gould and his group.

Q. How long have you been in the real estate business personally?

A. For 25 years.

Q. What business do you have outside of being the liquidating trustee?

A. I'm president of the Keyes Company.

Q. In your opinion, do you have a very good close familiarity with the taxing authorities in Dade County, tax assessment procedures and the values of real property in Dade County?

A. I do.

Q. Sir, did you make a value judgment as a businessman in this case as to whether or not this settlement was in the best interest of the estate?

A. I did.

Q. What is your opinion?

A. It's my opinion that based upon the costs of litigation, the probability of the failure of the litigation, the disaster to the liquidating trust if we have to pay more money out, which we don't have, and the ability to get money back in order to meet our other obligations, it all became a very good settlement that we should pursue.

Q. Did you ever give any instructions to Mr. Blake or any other representative, Shutts & Bowen or otherwise, concerning whether or not to favor the Bank of New York in any universal settlement, global settlement?

A. I never had a concern concerning the Bank of New York.

Q. Do you believe this settlement favors the Bank of New York over the trust?

MR. MARK: Objection, that is leading. Now we are getting into the heart of the issues.

MR. STETTIN: Why is that misleading: "Do you believe that the settlement favors the Bank of New York over the trust?"

MR. MARK: It calls for a yes or no answer.

MR. STETTIN: But so do most questions, Judge.

THE COURT: Overruled.

MR. MARK: Go ahead.

* * *

BY MR. MARK:

Q. You testified earlier, Mr. Smith, that the monies that remain in escrow after payment of the taxes would be returned to the trust; correct?

A. Right.

Q. Any monies left in the trust after payment of all claims would go to the residual beneficiaries?

A. Correct.

Q. It is a fair statement, then, isn't it, sir, that the less money that the trust has to pay in taxes for these disputed years, the more that will be refunded and the more that — at least the more potential there will be for additional refunds for the beneficiaries?

A. Yes.

Q. Now, it is your testimony, isn't it, sir, that you didn't concern yourself with the deal that the current owners, M.C. holding partners, were making for 1986 and '87, as long as you felt the deal was good for the year '79 through '85?

A. My only concern was were they going to make their settlement because as I understood it, Dade County would only make one global settlement with all parties concurring as to their portion of it, so I was concerned that, yes, the bank did settle but as to what it was or how they settled or what the cost was, was of no concern to me.

Q. They had to agree but you didn't feel as if the amount they agreed to had any influence on the amount the County was going to get from you?

A. That's right.

Q. And yet, sir, wasn't it your understanding that the County was looking for a certain total amount of additional payments to resolve the entire range of taxes for the year '79 through '87?

A. It was my presumption that they were looking for a bulk amount of money that they wanted to get into their tills.

Q. Now, if they were looking for a bulk amount of money, the two parties that were paying that bulk amount of money were the trustees and M.C. holding partners, in effect, the bank group; correct?

A. Right.

Q. If we assume it's a bulk amount of money, isn't it also fair to say, sir, that the more the bank pays, the less the trust pays and vice versa?

A. If that were a correct presumption, that would be true.

* * *

Testimony by Frank Jacobs:

That is not the argument that has been advanced, Judge.

THE COURT: Overruled.

BY MR. KRACHT:

Q. You are familiar?

A. I am familiar with the suggestion, yes.

Q. What is your position with respect to that suggestion?

A. It's very far from the truth.

Q. Are you aware or did you favor the Bank of New York to the expense of the liquidating trust to the detriment of the trust?

A. Absolutely not.

Q. Was it ever suggested to you in your negotiations and in your structuring of the settlement that you give preferential treatment to the '86 and '87 years over the '79 through '85 years?

MR. MARK: Objection, leading. This is argument, Judge.

THE COURT: Sustained.

MR. KRACHT: Your Honor, whether anyone instructed, gave him any of these instructions—

MR. MARK: Objection. This should be another question, the objection was sustained. Ask a question, please, sir.

* * *

Testimony by Theodore B. Gould:

* * *

The legal expenses associated with litigating the refund would be paid back to me first. The residual funds would be divided based upon the prorata interest of St. Joe Paper and myself and the payment of the real estate tax for 1979.

THE COURT: Is there such an arrangement? Is such an agreement in writing?

MR. STETTIN: His testimony was before, Judge, when I interrupted, that it was but he can't find it.

THE COURT: All right.

MR. STETTIN: That is the reason for my question because I have never seen it.

THE COURT: Well, I understand, and I was going to ask the same question, and also the contents relative to, if he is going to institute the suit, does he have the ability and the right to settle the suit.

MR. STETTIN: That is my next question.

THE COURT: Your next question, that was my question. I will listen.

BY MR. STETTIN:

Q. Let me lead up to it this way.

From 1979 when the suit was filed, did you pay the legal expenses?

* * *

A. Well, in fact, the office building earned a profit, an operating profit after the payment of ad valorem taxes but before debt service for all of those years.

MR. STETTIN: Thank you, sir.

CROSS EXAMINATION

BY MR. ZIEGLER:

Q. Mr. Gould, in regard to the St. Joe Paper Company agreement, you had the right to settle that case on any basis that you deemed appropriate; is that a fair statement of your agreement?

A. I don't think so.

Q. Could you have settled that case and gotten a zero refund or a one dollar refund?

A. I did not, I regret to say, raise that issue you with Mr. Ball so I don't know. I would certainly have to — I would have had to have discussed it with Mr. Ball and Mr. Wheeland (phonetic) and report back.

Q. Was that part of the written agreement?

A. It wasn't part of the agreement but I would, as a matter of fact, as a matter of ethics, do that.

Q. As a matter of legal obligation, you had the right to settle the case at whatever you thought needed to be done?

MR. MARK: Objection, calls for a legal conclusion.

THE WITNESS: I don't think so. As a matter of legal obligation, I had the responsibility to request their authority to settle it. After all, they would receive part of the refund.

BY MR. ZIEGLER:

Q. Whatever that may have been, whether it was 50 cents or whatever.

How much refund was being sought for 1979?

A. \$147,000.

Q. How much did you spend with Shutts & Bowen and Tax Adjustment Experts and everybody else that you would attribute to the 1979?

A. About \$30,000.

Q. So, we are down to roughly \$110,000 if you won the case a hundred percent for '79?

A. Let's put it this way, Mr. Ziegler. Mr. Ball and I felt the same way about the taxes.

MR. STETTIN: If he doesn't ask him, Judge, I will. I am dying to know what Mr. Ball feels about taxes.

(Laughter)

MR. MARK: I assume that is a waiver of the hearsay objection. Go ahead and answer it.

MR. ZIEGLER: Given the fact there is only 15 minutes left, we're not going to get involved with the land

Mr. Ball owned and why he wouldn't want to pay ad valorem taxes.

(Laughter)

BY MR. ZIEGLER:

Q. Did Shutts & Bowen ever raise or anybody else ever raise in the Circuit Court cases the failure to file the claims as a basis for the dismissal of any litigation or the determination of litigation? Is that part of the pleadings?

A. I am sorry, would you ask the question again, please?

Q. Has the issue of no taxes being due for the years of '84 and '85 ever been raised in the cases which you had an active participation in with Shutts & Bowen?

A. In the State Court, you mean?

Q. Yes, sir?

A. I don't know.

Q. You don't know whether it was ever made part of those pleadings?

APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 85-3230-Civ-ATKINS

**OLYMPIA & YORK FLORIDA EQUITY CORP. and
MIAMI CENTER JOINT VENTURE,**

Appellants,

vs.

THE BANK OF NEW YORK,

Appellee.

MEMORANDUM OPINION

Olympia & York Florida Equity Corporation (O&Y), as a general partner of Miami Center Joint Venture (MCJV), appeals from the bankruptcy court's Confirmation Order confirming a Chapter 11 plan of reorganization initiated by five debtors. Competing plans of reorganization were submitted to the creditors who rejected the debtors' plans and adopted the Bank of New York's (Bank's) plan. O&Y/MCJV asserts that its claim was improperly classified under this plan.

Pursuant to 11 U.S.C. § 1129(b), the court may confirm a plan even though a class has rejected it if all other requirements of § 1129(a) have been fulfilled and "the plan does not discriminate unfairly, and is fair and equitable," with respect to that class. *Id.* O&Y/MCJV, as the only creditors in Class 7, voted to reject the plan. Therefore, the question presented is whether the plan fulfilled the requirements of § 1129(b).

I. STATEMENT OF THE CASE

A. The Parties and Their Respective Interests¹

The five debtors include the Holywell Corporation, a Delaware corporation ("Holywell"), of which debtor Theodore B. Gould ("Gould") is the sole stockholder and president; Miami Center Limited Partnership, a Florida limited partnership ("MCLP") of which Gould and debtor Miami Center Corporation ("MCC") are sole general partners and are also limited partners; MCC, A Florida corporation and wholly-owned subsidiary of Holywell (Gould is also president of this entity); Chopin Associates, a Florida general partnership ("Chopin") of which Gould and MCC are the sole general partners; and Gould himself.

The Bank was the construction lender for Phase I of the debtors' "Miami Center" complex. That Phase consists of the Edward Ball Office Building, the Intercontinental Hotel (known as the "Pavillon" during the Gould group's ownership), retail space between them known as the "Podium," and an adjoining parking garage (collectively known as the "Miami Center Project"). The Bank has its offices in New York, New York, and is chartered under the laws of the State of New York.

MCJV is a Florida general partnership formed by debtor Gould and O&Y. At all material times, Gould served as "managing venturer" and general partner of MCJV. MCJV owns four vacant lots near the existing Miami Center Project. Gould and O&Y, as the only partners, originally planned to construct Phases II and III of Miami Center on those lots, but disputes and arbitration between the two partners has precluded further construction or development.

¹Attached as court appendices I and II are two diagrams which set forth, graphically, the relationship between the various entities involved in this bankruptcy proceeding.

Over 400 other creditors have or had an interest in these proceedings, including the IRS, the Dade County Tax Collector, many of the contractors and subcontractors involved in the construction, former employees, and others. Creditors' committees were appointed by the bankruptcy court, and have been active for the Holywell, MCLP, and MCC estates.

B. General Background Information

During the summer of 1984, the Bank initiated foreclosure proceedings in state court after declaring the debtor's mortgage loans on the Miami Center to be in default. The debtors quickly responded by filing their voluntary petitions for reorganization on August 22, 1984. During the Chapter 11 reorganization proceedings, the debtors and the Bank filed competing reorganization plans. The various creditors' committees and individual creditors rejected the debtors' plans and adopted the Bank's plan, although it was rejected by the impaired classes 7-9. This plan was then confirmed by the bankruptcy court over the Class 7 creditors' objection pursuant to 11 U.S.C. § 1129(b) (1979).

Several appeals were taken from the various bankruptcy proceedings. Two of these appeals were closely related to this one. In one, *Bank of New York v. Olympia & York Florida Equity Corp.*, No. 85-3430-Civ-ATKINS (June 23, 1986), the Bank sought reversal of a final judgment and related orders of the bankruptcy court in an adversary proceeding. The bankruptcy court found that certain lease agreements relating to furniture, fixtures, and equipment (FF&E) within the Miami Center project were "true leases." After reviewing the bankruptcy court's orders and the lease agreements, I affirmed. This action was significant because it formed the foundation for O&Y/MCJV's priority claims as the owner/lessor of the FF&E.

Another appeal went before Judge Aronovitz in which he was asked to review the same confirmation order as it related to other classes under the Bank's plan. After reviewing the confirmation order, he found that the bankruptcy court failed to enter clear and concise findings of fact and conclusions of law which would support its order; therefore, he remanded the case. Following the proceedings on remand, Judge Aronovitz affirmed the amended confirmation order as it related to those aspects of the Bank's plan on appeal before him.

Having resolved the "true lease" issue which established the nature of O&Y/MCJV's claim as to the FF&E, I carefully reviewed the confirmation order as it related to Class 7 of the plan. Like Judge Aronovitz, I found that it was necessary to remand the case for a more detailed order clearly elucidating the basis for the bankruptcy court's decision to place O&Y/MCJV's claim in class 7 of the plan.² On November 10, 1986, the bankruptcy court concluded its remand proceedings and entered its Order on Remand in which it adopted the proposed findings of fact and conclusions of law submitted by the Bank.³ Thus, the initial

²Remand proceedings were appropriate under *Wilson v. Huffman* (*In re Missionary Baptist Foundation of America*), 712 F.2d 206 (5th Cir. 1983). There, the district court evaluated the record to find sufficient findings of fact to satisfy each of *Mobile's* three elements for equitable subordination. The Fifth Circuit remanded the case saying:

These findings, though perhaps inherent in the bankruptcy court's ruling, were not enunciated. Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element of the *Mobile* test, that the trustee has discharged his burden of proof thereunder.

Id. at 212 (emphasis added).

³O&Y/MCJV challenges the propriety of the bankruptcy judge's verbatim adoption of the Bank's proposed findings and conclusions, and
(Footnote continued on next page)

Confirmation Order, as amended by the adoption, *nunc pro tunc*, of the explicit findings of fact and conclusions of law, constitutes the foundation for O&Y/MCJV's appeal.⁴

C. The Nature of the O&Y/MCJV Claim

The appeal before this court concerns only the rights and claims of MCJV, prosecuted by O&Y as its general partner, and managing venturer relating to the FF&E leases. Originally, O&Y filed separate claims as a creditor; however, in conjunction with the Trustee's consent to entry of the final modified arbitration award, O&Y issued a formal release of all its own claims against debtor Gould.⁵ O&Y/MCJV asserts that it has priority claims for the market value of the FF&E, the cumulative defaulted rental payments and late charges accrued from March 1, 1983 to

(Footnote continued from previous page)

asserts that the "blanket adoption" of one party's findings and conclusions indicates that the court failed to conduct a thorough, independent analysis of the evidence and the law. While this practice has been severely criticized, see *Cabriolet Porsche-Audi v. American Honda Motor Company*, 773 F.2d 1193, 1198 n.2 (11th Cir. 1985), it is permissible. See *Anderson v. Bessemer City*, 470 U.S. ___, 105 S.Ct. 1504 (1985). Nevertheless, such a practice invites particularly close scrutiny of the findings in light of the record.

"On remand, the bankruptcy court correctly determined that it was not called upon to alter or enhance the record. I simply wanted a more detailed explanation concerning the basis for the court's approval of the plan. Therefore, the record, as it stood at the time of confirmation, must support the amended findings.

*O&Y and Gould initiated arbitration proceedings against each other in 1982 based upon their conflicting views regarding the operation of MCJV. The bankruptcy court permitted O&Y to pursue its rights under the relevant arbitration statutes and to proceed to an award in a court of competent jurisdiction, although it recognized that these proceedings could affect O&Y's and Gould's interests in MCJV. The final modified award was executed by the arbitrators on June 30, 1986 and entered as a judgment in the Florida Circuit Court on July 10, 1986.

October 10, 1985, and defaulted rental payments and late charges from October 10, 1985.⁶

II. DISCUSSION

This appeal presents many complex legal issues. Over 400 parties struggled through the bankruptcy proceedings, under that court's supervision, attempting to make the best of an undesirable situation. The plan has been substantially consummated, and appears to have been successfully implemented.⁷ Nevertheless, O&Y/MCJV vehemently objects to the placement of its claim concerning the FF&E into class 7 of the plan. Conversely, the Bank argues that this classification was eminently correct, because it satisfied all statutory requirements under the Code.

A. Standard of Review

A district court must accord substantial deference to the bankruptcy court's findings of fact, and should reverse only when they are "clearly erroneous." *Wilson v. Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206, 209 (5th Cir. 1983); Bankruptcy Rule 8013. Moreover, the bankruptcy court's balancing of equities in analyzing the plan's fairness is a factual process, therefore, the court's determination on this point is also subject to the "clearly erroneous" standard of review. *Danning v. General Motors Acceptance Corp. (In re Jules Meyers Pontiac, Inc.)*, 779

⁶MCLP was supposed to make rental payments to MCJV under the lease agreement as of March 1, 1983. On October 10, 1985, the trustee transferred his interest in the FF&E to the Bank and its designated transferee.

⁷The claims classified under the plan from Class 1 to Class 6 have either been paid in full or funds have been reserved for the disputed items. In addition, in the most recent reports, the Liquidating Trustee estimated that approximately \$3 million will be available to satisfy the remaining claims.

F.2d 480, 482 (9th Cir. 1985). Conclusions of law, however, are subject to plenary review. *Machinery Rental v. Herpel* (*In re Multiponics*), 622 F.2d 709, 713 (5th Cir. 1980) (hereinafter referred to as "Multiponics").

B. Classification Under The Code

A Chapter 11 plan of reorganization may involve the sale of all or substantially all of the debtor's assets. 11 U.S.C.A. § 1123(b)(4) (1979). After all, one of the primary goals of the bankruptcy code is to effectuate an equitable distribution of the debtor's assets in satisfaction of its debts. *Benjamin v. Diamond* (*In re Mobile Steel Co.*), 563 F.2d 692, 698 (5th Cir. 1977). To achieve the goal, the plan must group the claims or interests by classes. 11 U.S.C.A. §§ 1122, 1123 (1979)*; Bankruptcy Rule 3013. "The classes which hold priority claims must be specially organized and full payment

*11 U.S.C.A. § 1122(a) provides:

Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

11 U.S.C.A. § 1123 provides (in pertinent part):

- (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall —
 - (1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2) or 507(a)(7) of this title and classes of interests;
 - (2) specify any class of claims or interests that is not impaired under the plan;
 - (3) specify the treatment of any class of claims or interests that is impaired under the plan;
 - (4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim of interest;
 - (5) provide adequate means for the plan's implementation

is mandatory although the payment may be deferred." R. Aaron, *Bankruptcy Law Fundamentals*, § 1.04 at 1-22 (1986) (footnote to citations omitted).

The Bank urges that its plan is acceptable because the classification of the MCJV lease claims is fair and equitable, and does not discriminate unfairly under § 1129(b).⁹ Furthermore, the Bank asserts that O&Y/MCJV's claim is not substantially similar to other claims or interests, because 50% of any distribution on MCJV's claim would go to debtor Gould. However, having reviewed the facts and the relevant legal principles, I conclude that the Bank is incorrect.

Under the Bank's plan, O&Y/MCJV's claim cannot be paid until all claims filed by other creditors not affiliated with Gould have been satisfied. In effect, this classification structure means that even general unsecured creditors will be paid before O&Y/MCJV. To justify its treatment of the O&Y/MCJV claim, the Bank relies heavily on the factual premise that any distribution on the O&Y/MCJV claim will benefit Gould. However, this premise is incorrect. Any payment to O&Y/MCJV based on the FF&E leases *would not* benefit debtor Gould. In fact, Gould's share of any MCJV proceeds, rents, or profits are available to the liquidating trustee, since "*all legal or equitable interests of the debtor in property as of the commencement of the case,*" or any "[p]roceeds, . . . rents, or profits of or from property

⁹11 U.S.C.A. § 1129(b)(1) provides:

(b)(1) Notwithstanding section 510(g) of this title if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

of the estate . . ." become part of the bankruptcy estate. 11 U.S.C.A. § 541(a) (Supp. 1986) (emphasis added). *See also In re Wallen*, 43 Bankr. 408, 409 (D. Idaho 1984); *Houchen v. Gadberry (In re Gadberry)*, 30 Bankr. 13, 14 (C.D. Ill. 1983); *Dominican Fathers of Winona v. Dreske (In re Dreske)*, 25 Bankr. 268, 271 (E.D. Wis. 1982); *Don/Mark Partnership v. James B. Nutter & Co., (In re Don/Mark Partnership)*, 14 Bankr. 830, 832 (D. Colo. 1981); cf. *Missouri v. Eastern District of Arkansas*, 647 F.2d 768 (8th Cir. 1981) (court held that debtor's 2.3% fractional interest in deposited grain was sufficient to bring all property under the bankruptcy court's jurisdiction.) In short, any interest Gould held in MCJV became part of the bankruptcy estate upon the commencement of this case.

The Bank's position is incorrect for another reason. The plan must satisfy the requirements of code sections 1122, 1123, and 1129. While the Bank feels that the plan's classification structure fulfills all of these code requirements, I disagree.

Classification is simply the process under which the plan's proponent recognizes the legal differences between various claims and interests, and ranks them according to their nature and priority. *See Scherk v. Newton (In re Rocky Mountain Fuel Co.)*, 152 F.2d 747, 750-51 (10th Cir. 1945); *Seidel v. Palisades-on-the Desplains (In re Palisades-on-the-Desplaines)*, 89 F.2d 214, 217 (7th Cir. 1937). *See also* 11 U.S.C.A. § 1129(b) (1979). A party submitting a plan of reorganization has considerable discretion to determine the proper classification of claims and interests according to the unique factual circumstances presented; however, ". . . there must be some limit on a debtor's power to classify creditors in such a manner. The potential for abuse would be significant otherwise." *Teamsters National Freight Industry Negotiating Committee v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800

F.2d 581, 586 (6th Cir. 1986). The result is not surprising—considerable discretion is permitted in determining the proper classification of claims and interests; however, if the plan unfairly creates too many or too few classes, or violates basic priority rights, the court cannot confirm the plan. See *id.* Thus, classification principles cannot be employed to effectuate the subordination of valid claims. See *In re Martin's Point Limited Partnership*, 12 Bankr. 721 (Bankr. N.D. Ga. 1981); 11 U.S.C.A. § 1129(b).

One final point merits discussion under the “classification” issue. In its initial brief, the Bank argued that the MCJV claim is partially an equity interest. Yet, even if this assertion were true, it would not justify the subordination of a valid claim. *Id.* at 727 (“. . . a valid claim of a creditor who is also an equity security holder is not to be subordinated to the claim of a creditor who is not also an equity security holder, but is to be treated equally.”).

C. Claims of An Insider

In support of the plan’s classification structure, the Bank emphasizes O&Y/MCJV’s status as an insider.¹⁰ The Bank argues that appellant’s status is significant for two reasons. First, the Bank urges that insider creditors may not be given the same priority as unsecured creditors. *In re Toy & Sports Warehouse, Inc.*, 37 Bankr. 141, 152 (Bankr. S.D.N.Y. 1984) *In re Economy Cast Stone Co.*, 16 Bankr. 646, 651 (Bankr. E.D. Va. 1981). Alternatively, the Bank asserts that an insider creditor’s claims must be closely scrutinized to determine whether equitable subordination is warranted. *Estes v. N&D Properties, Inc. (In re N&D Properties, Inc.)*, 799 F.2d 726, 731 (11th Cir. 1986);

¹⁰MCJV is an insider because it is a “partnership in which the debtor is a general partner.” 11 U.S.C.A. § 101(28)(A)(ii) (Supp. 1986). O&Y is an insider because it is a “general partner of the Debtor.” 11 U.S.C.A. § 101(28)(A)(iii) (Supp. 1986).

Multiponics, 622 F.2d 709, 714 (5th Cir. 1980). If the claimant is an insider, the party seeking equitable subordination need present only "material evidence of unfair conduct," and need not provide proof of, "more egregious conduct such as fraud, spoliation or overreaching." *Estes* at 731.

O&Y/CJV responds with two arguments. First, appellant contends that it is not an insider in the legal connotation of the term. Second, appellant assumes a "fallback" position arguing that the mere invocation of the term "insider," without more, does not serve to meet any standard or test required by law for equitable subordination.

The code is clear regarding the definition of an insider. In this case, it is beyond question that O&Y and MCVJ are insiders. See 11 U.S.C.A. § 101(28)A(ii) and (iii). However, the insider label is not sufficient, in and of itself, to justify the subordination of a claim. Insider's claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors. See *Estes* at 731; *Multiponics* at 713; *Huffman* at 212. Further, appellant asserts that even where the claimant is an insider the proponent of the plan bears the burden of presenting material evidence of inequitable and unfair conduct damaging the creditors. See *Multiponics* at 714; *Estes* at 731.

Two cases are particularly relevant regarding the subordination of an insider's claim. In *Huffman*, the Fifth Circuit found that "Huffman was an insider." *Id.* at 211. Nevertheless, the court indicated that the three-prong test of *Mobile* still had to be satisfied. "Though we agree that Huffman's insider connection with the debtor compels close examination of his claim, we cannot conclude, in the absence of explicit findings by the bankruptcy court on each element

of the *Mobile* test, that the trustee has discharged his burden of proof thereunder." *Id.* at 212.

Very recently, the Eleventh Circuit examined this issue in *Estes*, and followed the teachings of *Mobile* and *Huffman*. The court expressly stated that three elements must be established before a claim may be equitably subordinated. See *Estes* at 731. Where the claimant is an insider, the trustee's burden of proof in establishing evidence of unfair conduct is somewhat lessened, but the claim is not automatically subordinated. See *id.*¹¹

D. Equitable Subordination

The principle of subordination is firmly established in bankruptcy proceedings. This doctrine permits the court to lower the priority of a valid claim to achieve an equitable result when the claimant has been guilty of improper conduct.¹² 3 *Collier on Bankruptcy* ¶ 510.02 (15th Ed. 1986). Although the doctrine was judicially created,¹³ it has now been codified within the bankruptcy code. Currently, the relevant provision is found at 11 U.S.C.A. § 510(c) which provides:

"Significantly, I note that Congress specifically rejected a provision which would have automatically subordinated certain insider claims as a matter of law. See S. Rep. No. 989, 95th Cong., 2 Sess. 74 (1978); H.R. 31, 95th Cong., 1st Sess. (1975).

"Subordination is not the same as disallowance. "If a creditor's misconduct has been directed toward the debtor . . . the claim . . . is disallowed." 3 *Collier on Bankruptcy*, ¶ 510.02 (15th Ed. 1986). Subordination is employed when a claim is valid, but the claimant's conduct is such that equitable considerations require it to be paid after other claims have been satisfied. See *id.*

¹¹Under the previous Act, courts subordinated creditor's claims based upon the bankruptcy court's grant of equitable jurisdiction. See *Pepper v. Litton*, 308 U.S. 295 (1939).

§ 510 Subordination

* * *

(c) Notwithstanding subsection (a) and (b) of this section, after notice and a hearing, the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest, or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

Section 510(c) authorizes subordination when the court finds that an equitable remedy is required. Established case law, however, continues to be significant because § 510(c) indicates that its application should follow equitable principles. See *3 Collier on Bankruptcy* ¶ 510.01 (15th Ed. 1986). To resolve subordination situations, the Fifth Circuit established a three part test to determine when a claim or interest should be subordinated. See *Mobile* at 700. This test has been expressly adopted by the Eleventh Circuit. See *Estes* at 731. The three elements of the test include:

- (1) that the claimant has engaged in inequitable conduct;**
- (2) that the conduct has injured creditors or given unfair advantage to the claimant; and**
- (3) that subordination of the claim is not inconsistent with the Bankruptcy Code.**

Id. (citation omitted).

In proving the elements for equitable subordination, one must first determine the status of the claim holder.

The burden and sufficiency of proof required are not uniform in all cases. Where the claimant is an insider or a fiduciary, the trustee bears the burden of presenting material evidence of unfair conduct. Once the trustee meets his burden, the claimant then must prove the fairness of his transactions with the debtor or his claim will be subordinated. If the claimant is not an insider or fiduciary, however, the trustee must prove more egregious conduct such as fraud, spoilation, or overreaching, and prove it with particularity.

Id. (citations omitted). Additionally, the trustee, or other moving party, must show the extent of any inquiry or unfair advantage to determine the extent to which the claim should be subordinated. The claim should only be subordinated to the extent necessary to offset the harm caused by the unfair conduct. *See Benjamin*, at 701. "For example, if a claimant guilty of misconduct asserts two claims, each worth \$10,000, and the injury he inflicted on the bankrupt or its creditors amounted to \$10,000, only one of his claims should be subordinated." *Id.* at 701. Finally, the evidence must show which creditors were disadvantaged, because a valid claim should only be subordinated to the claims of the disadvantaged creditors. *See Estes* at 732-33.

In this case, the bankruptcy court appears to have relied upon three facts to fulfill *Mobile's* tripartite test. First, the court imputed Gould's acts of misconduct to O&Y/MCJV as a matter of partnership and agency principles. Second, the court found that O&Y/MCJV was responsible for MCLP's undercapitalization. Third, the court found that O&Y

substantially contributed to MCJV's and Gould's financial difficulties, to the detriment of other creditors, by failing to provide or arrange for the financing of Phases II and III of the Miami Center.

O&Y/MCJV challenges all of these facts and asserts that there is no semblance of proof of wrongful conduct of the claimant/appellant affecting the debtors' creditors. First, O&Y/MCJV argues that all of Gould's acts of misconduct were outside the course and scope of the partnership's business. In fact, Gould's conduct was *against* O&Y and the partnership's interest. Therefore, appellant urges that Gould's misconduct cannot be used to subordinate its claim. Second, O&Y/MCJV suggests that the theory of undercapitalization of MCLP is outrageous and incomprehensible. Appellant insists that MCJV was the victim of, not a contributor to, MCLP's poor financial situation. Finally, appellant states that everyone recognized that the construction of phases II and III of the Miami Center would have subjected Gould to even greater losses and further indebtedness. Thus, appellant's failure to provide financing for further development could not have injured any of the debtor's creditors.

After carefully considering the facts, I conclude that the evidence was insufficient to satisfy the elements of equitable subordination. First, I find that the court erred when it imputed Gould's acts of misconduct to O&Y/MCJV. These acts were clearly outside the ordinary course of the business of the partnership and not authorized by O&Y. *See Fla. Stat. Ann. § 620.62 (1977).*¹⁴ Second, I simply cannot accept

¹⁴*Fla. Stat. Ann. § 620.62 (1977)* reads as follows:

Partnership bound by partner's wrongful act. — When loss or injury is caused to a person, not a partner in the partnership, or any penalty is incurred by a wrongful omission of a partner acting in the ordinary course of the business of the partnership

(Footnote continued on next page)

appellee's theory of undercapitalization. Perhaps the best indication that the FF&E lease was valuable was that the trustee was required to obtain title to the FF&E under the plan. Therefore, it is unreasonable to believe that the valuable FF&E lease agreements injured any of the debtor's creditors, even if I could somehow attribute MCLP's financial situation to O&Y/MCJV. Finally, I find that insufficient evidence was offered to prove that O&Y's failure to provide further financing hurt any creditors or gave O&Y an unfair advantage. Under the circumstances, O&Y's decision seems sound.

III. CONCLUSION

After carefully reviewing the amended confirmation order, I find that the court erred in confirming the plan which placed the O&Y/MCJV lease claim in class 7 beneath even the unsecured creditors. The plan, as structured, is not fair and equitable with respect to the class 7 creditor. None of the theories presented by the Bank justify the subordination of O&Y/MCJV's claim. I must, therefore, remand the case so that the bankruptcy court can determine O&Y's share of the claim.

On remand, the bankruptcy court must resolve two issues. First, the bankruptcy court should determine the value of the lease claim. Then, it should determine the respective interest in this claim held by O&Y and the bankruptcy estate (in lieu of debtor Gould).¹⁵

(Footnote continued from previous page)

or with the authority of his copartners, the partnership is liable for it to the same extent as the partner so acting or omitting to act. (emphasis added).

¹⁵O&Y and the Bank continue to dispute the interest each party holds concerning the lease claim. The bankruptcy court must determine what effect, if any, the arbitration proceeds have had which would alter the general partners' 50% interests.

Because the parties are in substantial disagreement regarding the payment of the claim, I feel compelled to resolve this point. O&Y should be paid:

- (1) First, from the cash which remains available to the trustee;
- (2) Second, from any property controlled by the trustee including Gould's interest in MCJV; and
- (3) Finally, from the surety bond provided by the Bank to guarantee O&Y's payment under the plan.

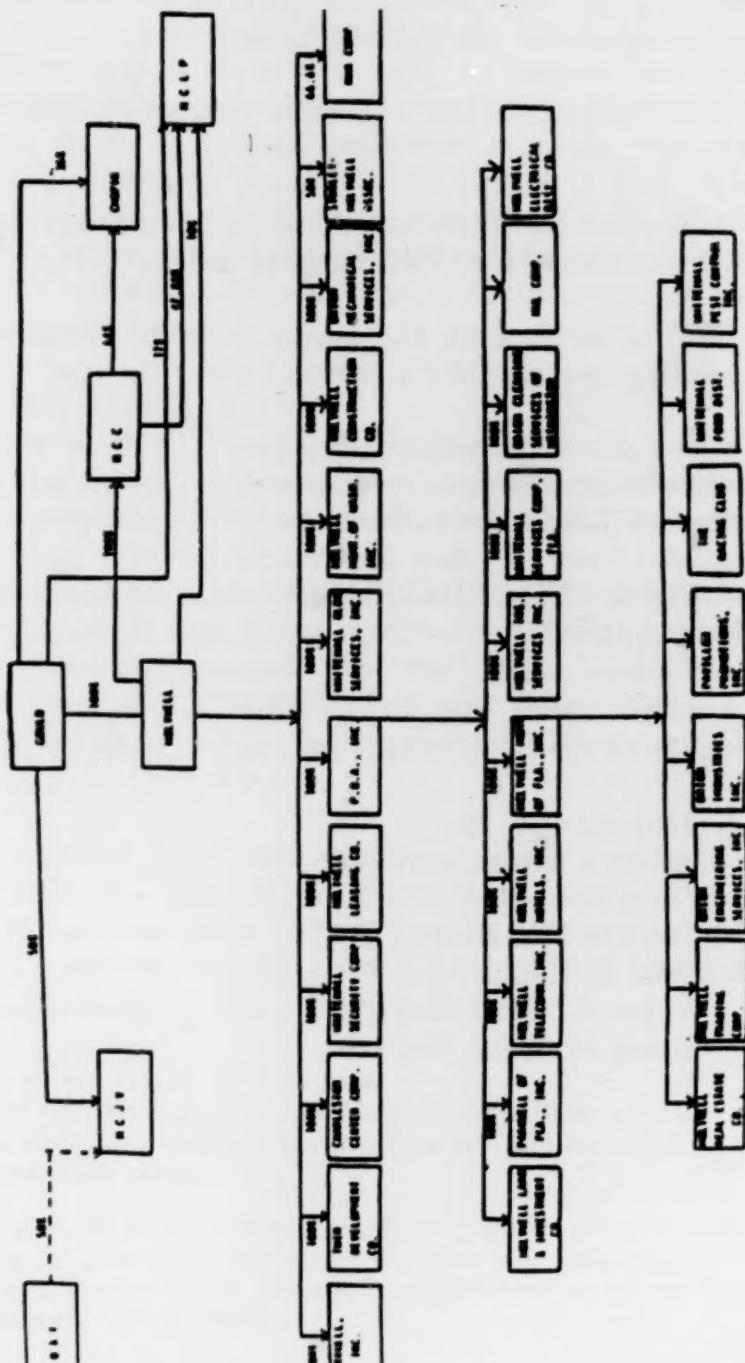
For all of the reasons expressed in this opinion, the order of confirmation is reversed and remanded for further considerations not inconsistent with this opinion.

DONE AND ORDERED at Miami, Florida, this 24 day of March, 1987.

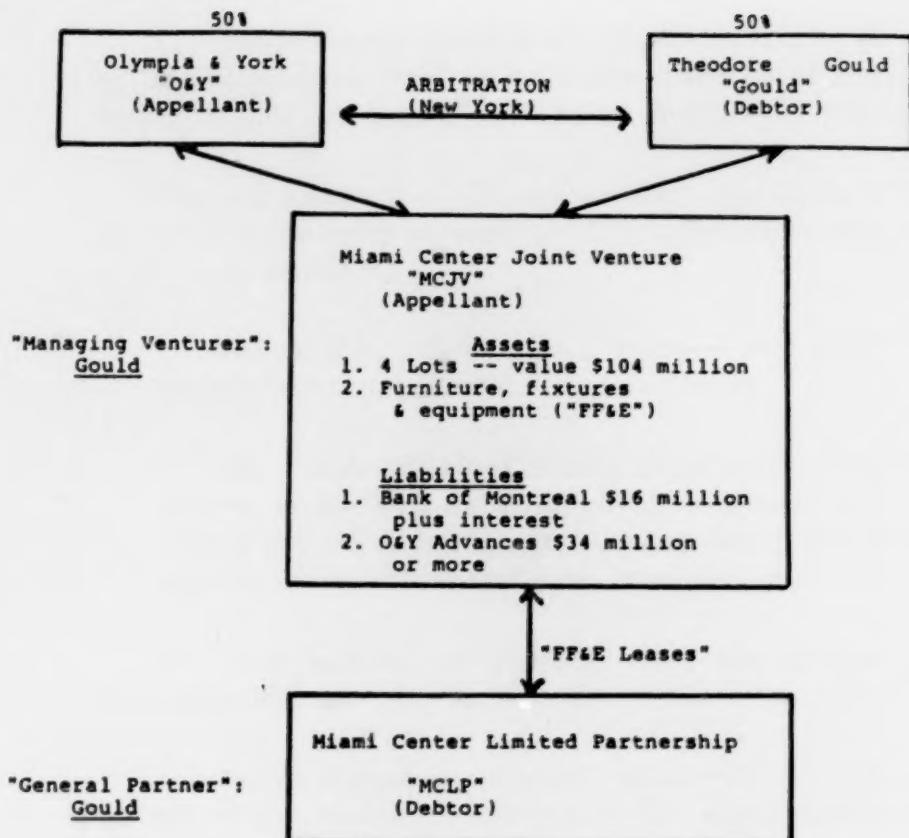
/s/ C. CLYDE ATKINS
UNITED STATES DISTRICT JUDGE

cc: John Kozyak, Esq.
Albert I. Edelman, Esq.
Scott D. Sheftall, Esq.
Raymond W. Bergan, Esq.
Fred H. Kent, Esq.
Vance E. Salter, Esq.
Irving M. Wolff, Esq.

Court Appendix I



Court Appendix II





APPENDIX C

11 U.S.C. Section 541(a): Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

- (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
- (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—
 - (A) under the sole, equal, or joint management and control of the debtor; or
 - (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
- (3) Any interest in property that the trustee recovers under section 543, 550, 553, or 723 of this title.
- (4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.
- (5) An interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

- (A) by bequest, devise, or inheritance;
 - (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
 - (C) as a beneficiary of a life insurance policy or of a death benefit plan.
- (6) Proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.
 - (7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. Section 945: Continuing jurisdiction and closing of the case

- (a) The court may retain jurisdiction over the case for such period of time as is necessary for the successful execution of the plan.
- (b) Except as provided in subsection (a) of this section, the court shall close the case when administration of the case has been completed.

11 U.S.C. Section 1104(a): Appointment of trustee or examiner

- (a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including, fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. Section 1129: Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

* * *

(3) The plan has been proposed in good faith and not by any means forbidden by law.

* * *

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

* * *

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a government unit, the court may not confirm a plan if the principal

purpose of the plan is the avoidance of taxes or the avoidance of section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

11 U.S.C. Section 3020(d): Deposit; Confirmation of Plan

(d) Retained power

Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate.

11 U.S.C. Section 9019: Compromise and Arbitration

(a) Compromise

On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

26 U.S.C. Section 6012(b): Persons required to make returns of income

(a) General rule.—Returns with respect to income taxes under subtitle A shall be made by the following:

* * *

(b) Returns made by fiduciaries and receivers.—

(1) Returns of decedents.—If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor,

administrator, or other person charged with the property of such decedent.

(2) Persons under a disability.—If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.

(3) Receivers, trustees and assignees for corporations.—In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts.—Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

(5) Joint fiduciaries.—Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to

enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.

Sup.Ct.R. 10 Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

In The

Supreme Court of the United States
October Term, 1990

Supreme Court, U.S.

FILED

DEC 14 1990

JOSEPH P. MANNOL, JR.
CLERK

IN RE: HOLYWELL CORPORATION, et al.,
Debtors,
 vs.

CHOPIN ASSOCIATES and
 MIAMI CENTER LIMITED PARTNERSHIP,
Petitioners,
 vs.

FRED STANTON SMITH, TRUSTEE, THE BANK OF
 NEW YORK, CITY NATIONAL BANK OF FLORIDA, AS
 TRUSTEE OF LAND TRUST NO. 5008793, S. HARVEY
 ZIEGLER, AS ESCROW AGENT FOR THE
 MIAMI CENTER LIQUIDATING TRUST, et al.,
Respondents.

**Petition For Writ Of Certiorari To The United States
 Court Of Appeals For The Eleventh Circuit**

**BRIEF IN OPPOSITION OF RESPONDENTS, THE
 BANK OF NEW YORK, CITY NATIONAL BANK,
 TRUSTEE; AND S. HARVEY ZIEGLER,
 ESCROW AGENT**

VANCE E. SALTER, Esq.
 MICHAEL J. HIGER, Esq.
 COLL DAVIDSON CARTER SMITH
 SALTER & BARKETT, P.A.
 3200 Miami Center
 201 S. Biscayne Boulevard
 Miami, Florida 33131
 Tel: (305) 373-5200
 [Counsel of Record]

Of Counsel:

THOMAS F. NOONE, Esq.
 EMMET MARVIN & MARTIN
 48 Wall Street
 New York, New York 10286
 Tel: (212) 422-2974

S. HARVEY ZIEGLER, Esq.
 KIRKPATRICK & LOCKHART
 2000 Miami Center
 201 South Biscayne Blvd.
 Miami, Florida 33131
 Tel: (305) 374-8112

QUESTION PRESENTED

Does this Court lack jurisdiction?

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BRIEF IN OPPOSITION OF RESPONDENTS, THE
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TRUSTEE; AND S. HARVEY ZIEGLER,
ESCROW AGENT

INTRODUCTION

Counsel for The Bank of New York (the "Bank"), one of the Respondents here, had just responded to the

Petitioners' most recent petition¹ when the Bank received this, their seventh frivolous petition for writ of certiorari. The Petitioners have also previously filed a petition for writ of mandamus. With the exception of Case No. 90-676 which is still pending, this Court has denied all of these petitions.² The decisions below arose out of five related bankruptcies that commenced in 1984.

Moreover, the Petitioners came to this Court after presenting the same frivolous arguments over the past six years to:

Two different bankruptcy judges;

Ten different district court judges in over thirty separate appeals; and

Eight judges of the United States Court of Appeals in over twenty separate appeals and in a petition for prohibition and mandamus.

STATEMENT OF THE CASE

The five affiliated debtors – Theodore B. Gould ("Gould"), Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin") – all filed voluntary petitions in bankruptcy on August 22,

¹ Case No. 90-676.

² Case Nos. 89-917, 89-864, 89-708, 88-80, 87-1989 and 87-1988. References to the Petitioner's Appendix will be denoted as "____a".

1984.³ The bankruptcy cases initially were consolidated for joint administrative purposes, and the five debtor estates were later substantively consolidated by Order dated July 23, 1985.⁴ Gould owned 100% of the stock of co-debtor Holywell, and also served as president and sole director of Holywell. In turn, Holywell owned 100% of the stock of co-debtor MCC, and Gould served as president and sole director of MCC. Gould and MCC were the sole general partners of debtor Chopin and of debtor MCLP. All five debtors were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami ("Project").

The Bank⁵ was the lead construction lender for the Project. Commencing in March of 1980, the Bank

³ For purposes of this response, the Petitioners will also be referred to as the "debtors."

⁴ Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and inter-debtor obligations are eliminated.

⁵ Pursuant to Supreme Court Rule 29.1, the following is a listing of the relationships of The Bank of New York:

(a) Parent of the Bank - The Bank of New York Company, Inc.

(b) "Affiliates" of The Bank are:

BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.C.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.

(Continued on following page)

advanced to the debtors in excess of \$196 million under the terms of a series of notes, mortgages and other loan documents. The Bank obtained a final judgment establishing the amount of its mortgage lien at over \$234 million as of March, 1985. The Bank proposed a plan of reorganization (the "Plan") that all classes of unaffiliated creditors overwhelmingly accepted but the debtors opposed. On August 12, 1985, the bankruptcy court appointed appellee, Fred Stanton Smith to serve as the Liquidating Trustee as provided under the confirmed Plan.

The debtors failed to obtain a stay pending review of the confirmation order. Thus, on October 10, 1985, the Liquidating Trustee began implementing the Plan in accordance with its terms.

Under the Plan, the Bank's designee (the "Purchaser"), a partnership comprised of affiliates of the Bank

(Continued from previous page)

Eastern Trust Company

The Bank of New York Life Insurance Co., Inc.

Capital Trust Company

BNY Financial Corporation

BNY Personal Brokerage, Inc.

Beacon Capital Management

The Bank of New York Trust Company, Inc.

The Bank of New York Trust Company of California

The Bank of New York Trust Company of Florida, N.A.

Leonard Newman Agency, L.P.

City National Bank was joined below solely in its capacity as the trustee of a land trust. It is not affiliated with the Bank.

and the participating lenders, bought the Project for its MAI-appraised value of \$255.6 million. The Bank paid that amount by paying approximately \$13 million in new cash over and above the judgment lien on the mortgages held by the Bank (that lien, with interest, was over \$242 million by October, 1985). In addition, the Bank released approximately \$30 million of cash collateral (which was used to pay hundreds of creditors pursuant to the Plan). All of the debtors' property became property of the Liquidating Trust, which then sold the Project to the Purchaser in accordance with the terms of the Plan.

The district court affirmed the confirmation order,⁶ and the United States Court of Appeals for the Eleventh Circuit dismissed the debtors' further appeal as moot, finding that "the plan had been substantially consummated and that . . . it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation."⁷

During the course of the bankruptcies, the debtors were contesting in state court in Dade County the Dade County property tax assessments on the Project for 1979-84. As of the date of the sale to the Purchaser, there were a number of pending *ad valorem* tax lawsuits originally filed by the debtors and subsequently pursued by the Liquidating Trustee following confirmation of the Plan. Because the Liquidating Trust acquired all property

⁶ *Holywell Corp. v. The Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), aff'd, *In re Holywell Corp.*, 49 Bankr. 694 (Bankr. S.D. Fla. 1985).

⁷ *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), cert. denied, 488 U.S. 823 (1988).

interests of the debtors, the Liquidating Trust also acquired those lawsuits.⁸

The Plan and the closing documents at the sale of the Miami Center to the Bank's nominee required the Liquidating Trustee to escrow a portion of the purchase price sufficient to pay the disputed *ad valorem* taxes. The escrow was established with the Liquidating Trustee's then counsel, Holland & Knight, and negotiations with Dade County for settlement continued. Thereafter, Holland & Knight withdrew as the Liquidating Trustee's counsel, and the bankruptcy court named appellee, Herbert Stettin (the Liquidating Trustee's present attorney), and appellee, S. Harvey Ziegler (one of the Bank's attorneys), as substitute escrow agents of the fund previously held by Holland & Knight.⁹

On March 1, 1988, several weeks before the Liquidating Trustee initially sought approval of the tax settlement, the debtors filed an adversary complaint in the bankruptcy court, Case No. 88-0117-BKC-SMW-A, in which, they sought by declaratory decree the same relief sought in their objections to the tax settlement: to have the tax claims of Dade County stricken based on Dade

⁸ Exhibit "C" to the Plan listed all the litigation involving the debtors, including the *ad valorem* tax lawsuits, which became a part of the Liquidating Trust pursuant to the Plan.

⁹ The district court's order also determined that the funds held in escrow were specifically set aside to pay the *ad valorem* property taxes on the Project. The debtors appealed this order to the district court, which dismissed the appeal. Case No. 88-0682-CIV-LCN. The Eleventh Circuit affirmed the dismissal of the debtors' appeal. Case No. 89-5165. The Petitioners did not seek review of that decision by this Court.

County's alleged failure to file proofs of claim in the Chapter 11 proceedings. Prior to filing this adversary proceeding, the Petitioners had actively participated in settlement negotiations with Dade County concerning payment of the *ad valorem* property taxes. By order dated November 18, 1988, the bankruptcy court dismissed this adversary complaint as a result of the Liquidating Trustee's approved settlement of the tax claims with Dade County. 82a.

The bankruptcy court heard testimony from several witnesses on April 28, 1988 on the Liquidating Trustee's motion to approve a settlement with Dade County of the *ad valorem* lawsuits.¹⁰ John Fletcher, an attorney specializing in *ad valorem* taxation matters, testified as to the difficult burden of proof facing the debtors/taxpayers in the *ad valorem* lawsuits. 74a. He further testified that the actual sale of the Project for \$255.6 million, which was the same amount as the MAI appraisal, constituted a substantial factor in determining the assessment.

The bankruptcy court further heard from A. H. Blake, a former tax assessor for Dade County and an expert in *ad valorem* matters, who testified that the settlement was fair, reasonable and in the best interests of the Liquidating Trust. 74a. The Liquidating Trustee, who is himself an

¹⁰ At a subsequent hearing on October 31, 1988 on the Liquidating Trustee's motion for approval of the amended tax settlement (amended to delete a requirement of the trust to pay post-petition interest), the Liquidating Trustee requested the bankruptcy court to take judicial notice of all of the testimony, exhibits and arguments presented at the April 28th hearing. No party objected, and the bankruptcy court granted the motion. 73-74a.

experienced businessman and real estate broker, testified that the settlement was in the best interest of the Liquidating Trust because it would: (a) terminate the multiple pending *ad valorem* lawsuits; (b) prevent exposure of the Liquidating Trust to an adverse judgment in favor of Dade County; and (c) preserve the debtors' claim that the failure to file a proof of claim bars Dade County's *ad valorem* claims. 74-75a.

The bankruptcy court also heard testimony from Gould regarding the interest Gould was asserting as to St. Joe Paper Company. St. Joe Paper Company was the prior owner from whom Gould purchased the unimproved property in 1979. Gould conceded that he could not produce any written agreement concerning a continuing ownership interest of St. Joe Paper Company to a tax refund for overpayment of 1979 *ad valorem* property taxes. 75-76a.

Further, the bankruptcy court heard evidence as to the terms of the amended settlement. The amended settlement compromised outstanding *ad valorem* taxes against the Project running from 1979 through 1985. Under the settlement, the Liquidating Trust would pay Dade County \$3,430,754.34 in *ad valorem* taxes for the period running from 1979 through 1984, as opposed to the amounts at risk in the lawsuits (in excess of \$11 million). The Bank also agreed to return to the Liquidating Trust a reprorated sum assessed against the Liquidating Trust as part of the October 10, 1985 sale of the Project. The bankruptcy court noted that this reproration would result in the Liquidating Trust receiving approximately \$400-500,000.00. 78a.

After having heard considerable testimony and receiving into evidence a substantial amount of deposition testimony, exhibits and other documents, the bankruptcy court entered its order on November 18, 1988, finding that the "terms of the amended settlement are reasonable and in the best interest of the liquidating trust." 82a. The district court affirmed noting: "The bankruptcy court conducted a searching *Jackson*¹¹ inquiry, and it approved the proposal only after the proceedings yielded a welter of evidence bearing on the propriety of settlement." 38a.

The Petitioners appealed this order affirming the bankruptcy court's order to the Eleventh Circuit. The Eleventh Circuit affirmed in a one-sentence, per curiam opinion, holding that the bankruptcy court had the authority to consider the settlement and did not abuse its discretion in approving the settlement. 33a. The Petition to this Court followed.

ARGUMENTS AGAINST GRANTING THE WRIT

Through the commencement over the past four years of over 60 appeals from bankruptcy and district court orders and seven petitions for review by this Court, the Petitioners have ignored prior rulings and have attempted to systematically dismantle the confirmed and substantially consummated Plan. This Court and the courts below have uniformly denied these frivolous attempts.

¹¹ *In re Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980)

These Petitioners, having exhausted their direct attacks on the Plan, have now sought to collaterally attack the Plan and the Liquidating Trustee's implementation of the Plan. This Court should not tolerate this blatant attempt to circumvent the bankruptcy and district court's orders.

The bankruptcy court's factual findings as to the propriety of the settlement were subject to the "clearly erroneous" standard as given "strict application." Bankr. R. 8013; Fed. R. Civ. P. 52; *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1476 (11th Cir. 1985); *In re Garfinkle*, 672 F.2d 1340, 1344 (11th Cir. 1982). The Eleventh Circuit did not err. This Court does not grant certiorari to review evidence. *Rogers v. Lodge*, 458 U.S. 613, 624 (1982).

LACK OF JURISDICTION

A. *The Petition Is Moot*

The debtors are again seeking the return of something the Bank specifically bargained for in the Plan. This Court, however, previously denied the debtors' petition for writ of certiorari from the Eleventh Circuit's opinion that the debtors' appeals are moot. *Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 823 (1988).¹²

¹² This Court has consistently denied certiorari jurisdiction where the court below held that the action, in whole or in part, was moot. See, e.g., *United States v. Local 30, United State, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401 (3d Cir.), cert. denied, 110 S. Ct. 363 (1989); *Cotton v.*

(Continued on following page)

The debtors' jurisdictional argument (Petition, pp. 22-27) and their rambling assault on several of the principal features of the Plan (Petition, pp. 16-21) are just another frivolous attack on the confirmed, and substantially consummated Plan. The Plan provides that the Purchaser would acquire the Project free and clear of any tax liens. The Plan also gives the Liquidating Trustee the authority to settle, compromise or release any disputes, litigations or controversies in favor of or against the Liquidating Trust or the debtors. The Liquidating Trust includes the *ad valorem* lawsuits. Further, the Plan provides the bankruptcy court with post-confirmation jurisdiction to enter any order necessary or appropriate in order to carry out the terms of the Plan. Thus, the Plan clearly gives the bankruptcy court jurisdiction to approve a settlement of tax liens against the Project.

The debtors' failure to obtain a stay pending their appeal of the bankruptcy court's order confirming the Plan renders their appeal on jurisdictional grounds moot, because the Plan has been substantially consummated.

This Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan has

(Continued from previous page)

Mansour, 863 F.2d 1241 (6th Cir. 1988), cert. denied, 110 S. Ct. 835 (1990); *Folkstone Maritime, Ltd. v. CSX Corp.*, 866 F.2d 955 (7th Cir.), cert. denied, 110 S. Ct. 60 (1989); *Tyler v. Black*, 865 F.2d 181 (8th Cir.), cert. denied, 109 S. Ct. 1760 (1989); *Spears v. Thigpen*, 846 F.2d 1327 (11th Cir. 1988), cert. denied, 488 U.S. 1046 (1989); *SunTek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179 (Fed. Cir. 1988), cert. denied, 488 U.S. 1009 (1989).

been substantially consummated. *Miami Center Limited Partnership v. The Bank of New York*, 901 F. 2d 931 (11th Cir. 1990); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). "In this situation the mootness doctrine promotes an important policy of bankruptcy law - that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the implementation of a confirmed plan irrevocably changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

B. The Debtors Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction

The debtors argue that this Court has jurisdiction by virtue of the existence of a conflict between the Eleventh and several of the other courts of appeal as to the appropriate standard for determining the propriety of a settlement. Petition, pp. 9-16. Notwithstanding the debtors' imaginative attempts to contrive a basis for this Court's jurisdiction, it is apparent that there is no conflict or important question of federal law to be resolved by this Court. Sup. Ct. R. 10.1.

The Petitioners argue that a conflict exists between the opinion rendered below and the decisions in *In re AWECO, Inc.*, 725 F.2d 293 (5th Cir.), cert. denied, 469 U.S.

880 (1984), *In re American Reserve Corp.*, 841 F.2d 159 (7th Cir. 1987) and *Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). Even from a very cursory review of these decisions, the Petitioners' arguments and the Opinion rendered below, it is readily apparent that a conflict does not exist. On the contrary, the frivolousness of Petitioners' contention is apparent from their own recognition that the district court relied upon and cited with approval each of these cases. Petition, p. 9; 37a.

In substance, the Petitioners are not arguing that a conflict exists as to the applicable standard, but rather that the lower courts did not correctly apply the "abuse of discretion" and "fair and equitable" standards to the facts in this case. The Petitioners have termed this a "conflict" because this Court does not grant certiorari to review evidentiary matters (particularly where two courts below have concurred in the findings of fact). *Rogers v. Lodge*, 458 U. S. 613, 624 (1982).

For example, the Petitioners argue for the first time (Petition, pp. 11-12) that the bankruptcy court did not make certain factual findings as to priorities and that the district court concluded that these factual findings were not necessary. This argument, of course, has nothing to do with the threshold question of whether a conflict exists. This argument also ignores the clear provisions of the Plan which provide that the Purchaser would acquire the Project free and clear of any tax liens.

The Petitioners also ignore the bankruptcy court's express consideration as to "the potential devastating effect an adverse ruling [in the *ad valorem* tax cases]

would have upon the liquidating trust and its ability to pay claims to creditors and return the surplus to the debtors." 81a. This consideration obviously took into account an assessment of the relative priorities of the creditors and a valuation of the estate. The bankruptcy court also made numerous findings as to the benefits and cost savings that would inure to the benefit of the Liquidating Trust as a result of the settlement. 77-79a. This too contemplates an assessment of relative priorities and a valuation of the estate.

The debtors also argue that the Plan does not provide for the payment of federal income taxes and that this failure "precludes the conclusion that the confirmed plan was fair and equitable to the United States." Petition, p. 16.¹³ The debtors have no standing to make this argument on behalf of the United States. These debtors can only allege injury to their own legal rights, and lack standing to assert claims for others. *Diamond v. Charles*, 476 U. S. 54, 61-72 (1986); *Allen v. Wright*, 468 U. S. 737, 750-52 (1984); *R. T. Vanderbilt Co. v. Occupational Safety & Health Review Comm'n*, 708 F.2d 570, 574 (11th Cir. 1983). Further, any argument regarding the tax provisions of the plan is an impermissible attack on the confirmed and substantially consummated Plan.

¹³ Petitioners also attempt to bolster their argument by making numerous references to yet another case pending in the Eleventh Circuit and no doubt soon to headed to this Court. See Petition, pp. 13, 17 (arguing the merits of *In re Holywell Corp.*, Case No. 89-5862; App. 13). The Eleventh Circuit and the district court have ruled against the Petitioners on this point.

C. *The Petitioners Other Arguments Are Meritless*

The Petitioners advance a hodgepodge of other arguments to support their contention that the lower courts erred. None of these arguments, however, provide this Court with a basis for jurisdiction.

Moreover, in raising their various challenges to the lower courts' findings and conclusions, the Petitioners have lost sight of the scope of the bankruptcy court's review of the amended settlement proposal. The bankruptcy court was not required to conduct a "mini-trial" as to each of the *ad valorem* lawsuits in order to determine whether the debtors might ultimately prevail. Rather, it was within the bankruptcy court's sound discretion to evaluate:

- (1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law,
- (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and
- (3) all other factors bearing on the wisdom of the compromise.

In re Jackson Brewing Co., 624 F.2d 605, 607 (5th Cir. 1980); *Protective Comm. for Indep. Stockholders of TMT Trailer v. Anderson*, 390 U.S. 414, 424-25 (1968).

The bankruptcy court scrutinized the merits of the settlement proposal first at a two-day evidentiary hearing in April of 1988. There was ample evidentiary support for the settlement proposal, but the bankruptcy court withheld approval until the parties agreed to strike from the proposal a provision that required post-petition interest

to be assessed against the Liquidating Trust. The parties did, in fact, delete this provision, and the bankruptcy court, after another hearing, approved the amended settlement proposal. 36-37a.

The district court, in affirming, noted: "The bankruptcy court conducted a searching *Jackson* inquiry, and it approved the proposal only after the proceedings yielded a welter of evidence bearing on the propriety of settlement." 38a. The bankruptcy court "recognized the complexity of all of the issues involved, the length of time required to resolve all of these issues, the expense involved in resolving all of these issues, the uncertainty of result, the potential devastating effect an adverse ruling would have upon the liquidating trust and its ability to pay claims to creditors and return surplus to debtors." 81a. The bankruptcy court further found that the settlement agreement was an "exercise of business judgment which appears . . . to be sound, reasonable and practical. It recognizes a large savings in tax to the liquidating trust; it permits the debtor, by appeal only, to continue to invalidate the tax claims in their entirety . . . ; and it assists in the orderly completion of work to be done in ending this case." 81a.

In this instance, the scope of review is very narrow; it is limited to determining whether the settlement approved by the bankruptcy court is "fair, equitable, and in the best interest of the estate." *Jackson*, 624 F.2d at 608. If there is a "substantial factual basis for the approval of a compromise" and the bankruptcy court set out "articulate findings and conclusions," the reviewing court must affirm unless there is some other abuse of discretion by

the bankruptcy court. *Id.*; *Florida Trailer & Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960).

1. The Law Is Uncertain As To The Duty Of A Non-Consensual Lienholder To File A Proof Of Claim

The law as to the obligation of a non-consensual lienholder to file a proof of claim is inconsistent nationwide, and the Eleventh Circuit has not yet decided this issue. The debtors erroneously argue (Petition, p. 20) that this is not a novel issue and that the Eleventh Circuit has decided this issue. In support of this position, they cite two cases: *In re Internat'l Horizons, Inc.*, 751 F.2d 1213 (11th Cir. 1985) and *In re South Atlantic Financial Corp.*, 767 F.2d 814 (11th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).¹⁴ These cases, however, are readily distinguishable and thus do not alleviate the uncertainty as to the result concerning this issue.

Unlike this case, *International Horizons* did not involve an *ad valorem* tax claim of a non-consensual lienholder. Further, *South Atlantic* did not even involve a lienholder, non-consensual or otherwise. Moreover, it is doubtful whether either of these cases are applicable in light of the county's argument in district court Case No. 86-2608-CIV-Kehoe, that it had an informal proof of claim. See, e.g. *South Atlantic*, 767 F.2d at 819 (amendment of informal claims).

¹⁴ The Petitioners improperly cited this case as being reported at "814 F.2d."

On the other hand, a number of cases have held that a non-consensual lienholder does not have to file a proof of claim.¹⁵ Further, Section 506(d) of the bankruptcy code provides that a lien will not be avoided solely because a proof of claim has not been filed. 3 *Collier on Bankruptcy* ¶ 506.07 at 506-69 to 506-70 (15th Ed. 1990).

This issue is further clouded by the fact that the debtors never established that Dade County actually received notice of the filing of the Chapter 11 petitions. Absent such proof, the debtors cannot now fairly object to a failure to file a proof of claim. See *In re Pack*, 105 Bankr. 703, 705-06 (Bankr. M.D. Fla. 1989).

Because of this uncertainty, the bankruptcy court did not abuse its discretion in approving the amended settlement. The risk that ultimately this issue would be decided in favor of Dade County and the potentially devastating affect that such a ruling would have on the Liquidating Trust was a factor the bankruptcy court analyzed; the bankruptcy court determined within its sound discretion that such a risk was not in the best interest of the Liquidating Trust in light of the terms of the amended settlement.

Even assuming that Dade County's failure to file a proof of claim impairs its lien claim in the bankruptcy

¹⁵ See, e.g., *In re G.S. Omni Corp.*, 835 F.2d 1317, 1318-19 (10th Cir. 1987); *In re Simmons*, 765 F.2d 547, 551 (5th Cir. 1985); *In re Stamford Color Photo, Inc.*, 105 Bankr. 204, 206-07 (Bankr. Conn. 1989); *In re Herbert Sys., Inc.*, 61 Bankr. 44, 46 (Bankr. W.D. La. 1986); *In re Atoka Agricultural Sys., Inc.*, 39 Bankr. 474, 476-77 (Bankr. Va. 1984); *Kinder v. Superior Court of Los Angeles County*, 125 Cal. App. 3d 308, 315, 178 Cal. Rptr. 57, 61 (1981).

court, Dade County's secured lien claim for *ad valorem* taxes would still survive the debtors discharge in bankruptcy. *In re Folendore*, 862 F.2d 1537, 1538-89 (11th Cir. 1989). Because the Plan provides that the Liquidating Trust shall deliver the Project to the Purchaser free and clear of any tax liens, the Liquidating Trust would still have a potential liability to the Purchaser as a result of any lien claim subsequently pursued by Dade County.

Given the uncertainty and length of litigation, the considerable expense associated with pursuing this issue, and the potentially devastating results to the Liquidating Trust if Dade County prevailed, the bankruptcy court certainly did not abuse its discretion in approving the settlement agreement. The bankruptcy court considered Dade County's failure to file a proof of claim and evaluated whether the compromise fell below the "lowest point in the range of reasonableness." *In re Telronic Servs., Inc.*, 762 F.2d 185, 189 (2d Cir. 1985); see *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir.), cert. denied, 464 U.S. 822 (1983); *In re Arrow Air, Inc.*, 85 Bankr. 886, 890-92 (Bankr. S.D. Fla. 1988).

The debtors failed to prove that the bankruptcy court did not meet the standard imposed by the court in *Jackson*. Because the law on the issue of a non-consensual lienholder's duty to file a proof of claim is unclear, and because a reasonable, rational basis in the record supports the business judgment of the Liquidating Trustee, the bankruptcy court did not abuse its discretion in approving the amended settlement. The tax settlement preserved the debtors' right to pursue the issue of Dade County's failure to file a proof of claim. The Liquidating Trustee, however, chose not to pursue the issue because,

in his business judgment, the risk and expense were too great and the settlement terms were fair. The bankruptcy court also considered this aspect of the Liquidating Trustee's decision, and approved the settlement as within the Liquidating Trustee's business judgment. The debtors have failed to prove that the compromise fell below the "lowest point in the range of unreasonableness" or that the bankruptcy court abused its discretion.

2. The County's Tax Claims Were Constitutional

The Petitioners suggest that there may also be a constitutional issue for this Court's review. Petition, pp. 25-27. Again, Petitioners are grasping at straws in an attempt to provide this Court with some basis for jurisdiction.

The Petitioners ridiculously argue that "the assessed valuations on the Miami Center were discriminatory, subjecting the taxpayer to taxes not imposed on comparable property . . ." Petition, p. 25. The proof below, however, established no such practices. The Petitioners did not produce any evidence to support this contention. All of the percentage increases and "per-room" valuation differences can be attributed to other facts (quality of construction, location, amenities, occupancy and physical depreciation).

3. The *Ad Valorem* Lawsuits Were An Asset/Liability Of The Liquidating Trust

Throughout their Petition, the Petitioners attempt to create the misimpression that they and not the

Liquidating Trust owned and controlled the *ad valorem* lawsuits. See, e.g. Petition, p. 24. The Plan, however, vested all of the debtors' assets, as defined by Section 541(a) of the bankruptcy code, in the trust, and specifically included the *ad valorem* tax cases. Article V of the Plan also gives the Liquidating Trustee the power and authority to "[s]ettle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them . . ." Because as noted above the Plan has been confirmed and substantially consummated, any challenge by the debtors to the Plan's provisions is now moot.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petitioners' frivolous petition for certiorari review.

Respectfully submitted,

S. HARVEY ZIEGLER, Esq.
KIRKPATRICK & LOCKHART
2000 Miami Center
201 South Biscayne Blvd.
Miami, Florida 33131
Tel: (305) 374-8112

Of Counsel:

THOMAS F. NOONE, Esq.
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10286
Tel: (212) 422-2974

COLL DAVIDSON CARTER
SMITH SALTER &
BARKETT, P.A.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 373-5200

By _____
VANCE E. SALTER

By _____
MICHAEL J. HIGER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December, 1990, a true and correct copy of the foregoing was mailed by first class, postage paid, U.S. mail to:

ROBERT M. MUSSelman, Esq.
MUSSelman & ASSOCIATES
413 Seventh Street, N.E.
Charlottesville, Virginia 22901
Telephone: (804) 977-4500

THEODORE B. GOULD, *pro se*
2565 Ivy Road
Charlottesville, Virginia 22901
Telephone: (804) 295-7125

HERBERT STETTIN, Esq.
2215 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 374-3353

DANIEL WEISS, Esq.
JAMES B. KRACHT, Esq.
Assistant County Attorney
111 N. W. 1st Street, Suite 2810
Miami, Florida 33128

MICHAEL J. HIGER

JEC 17 1990

In The

JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States
October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

CHOPIN ASSOCIATES, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its Partners, and MIAMI CENTER LIMITED PARTNERSHIP, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its GENERAL PARTNERS,

v. *Petitioners,*

FRED STANTON SMITH, Trustee, THE BANK OF NEW YORK, CITY NATIONAL BANK OF FLORIDA, as Trustee of Land Trust #5008793, DADE COUNTY, FLORIDA, a Municipality, JOEL ROBBINS, as Property Appraiser of DADE COUNTY, FLORIDA, FRED GANZ, as Tax Collector of DADE COUNTY, FLORIDA, RANDALL MILLER, as Executive Director of the FLORIDA DEPARTMENT OF REVENUE, S. HARVEY ZIEGLER, as Escrow Agent for the Miami Center Liquidating Trust, and HERBERT STETTIN, as Escrow Agent for Miami Center Liquidating Trust,

Respondents.

Petition For Writ Of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS DADE COUNTY, FLORIDA,
JOEL ROBBINS AND FRED GANZ IN OPPOSITION

ROBERT A. GINSBURG
Dade County Attorney
Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151

By
JAMES K. KRACHT
DANIEL A. WEISS,
Counsel of Record
Assistant County Attorneys
Attorneys for Dade County,
Joel Robbins & Fred Ganz

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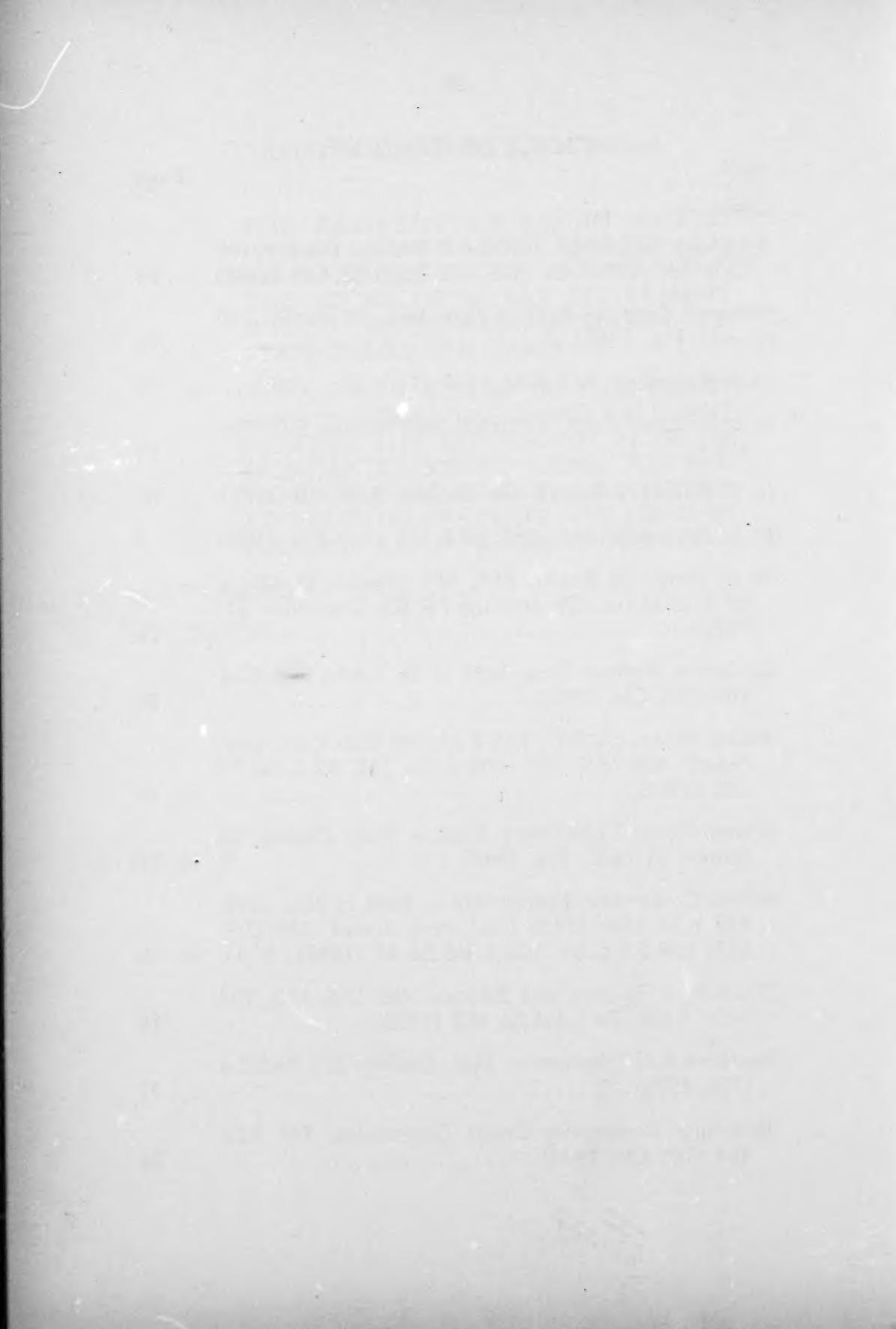
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OPINIONS BELOW

The only opinions relevant to the Petition for Writ of Certiorari herein are the Order Approving Amended Settlement of Ad Valorem Tax Claims entered by the United States Bankruptcy Court for the Southern District of Florida on November 18, 1988, Pet. App. 72; the Order Affirming Bankruptcy Court's Order Approving Amended Settlement of Ad Valorem Tax Claims entered by the United States District Court for the Southern District of Florida on July 6, 1989, Pet. App. 34; and the *per curiam* affirmance of the Bankruptcy Court's decision entered by the United States Court of Appeals for the Eleventh Circuit on August 14, 1990, Pet. App. 32.

JURISDICTION

The Petitioners seek review of the Eleventh Circuit's single-sentence affirmance of the Bankruptcy Court's approval of the comprehensive ad valorem tax settlement. The Petitioners have wholly failed to establish any jurisdictional basis for granting the Petition for Writ of Certiorari. They have not demonstrated the existence of a conflict among the United States Courts of Appeals or the existence of an important question of federal law which has not been, but should be settled by this Court. See Sup. Ct. R. 10.1(a)-(c).

STATEMENT OF THE CASE

Over six years ago, the Petitioners, two of five related Debtors,¹ filed voluntary Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of Florida. This is their eighth attempt at review in this Court. It follows their more than fifty appeals to the lower courts.²

The Petitioners here seek review of an order of the Eleventh Circuit Court of Appeals affirming the Bankruptcy Court's approval of a settlement of Dade County, Florida's ad valorem tax claims against the Miami Center. The settlement was entered into by Dade County, the Liquidating Trustee of the Miami Center Liquidating Trust, and the Bank of New York, and submitted to the Bankruptcy Court for judicial review and approval. The Debtors objected to this settlement and filed a separate adversary proceeding to block the compromise. After lengthy hearings and extensive briefing, the Bankruptcy Court by order dated November 18, 1988 approved the amended settlement. The Debtors appealed to the District Court and the Eleventh Circuit Court of Appeals, both of which affirmed. From these appeals, this Petition follows.

After filing voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code in 1984,

¹ The Petitioner/Debtors are Chopin Associates and Miami Center Liquidating Partnership, which in turn are related to and/or controlled by Debtors Theodore B. Gould, Miami Center Corporation and Holywell Corporation.

² Of the other seven petitions, six have been denied and one, filed in October, 1990, is pending.

and substantive consolidation of the Debtors' estates in 1985, the Bankruptcy Court confirmed the Amended Plan of Reorganization on August 8, 1985. Pursuant thereto, a liquidating trustee was appointed and took charge of the Debtors' property, including for purposes relevant here, the Miami Center Project and numerous lawsuits to which the Debtors were parties. The Bank of New York acquired the Miami Center Project from the trustee, for \$255.6 million, a valuation based upon an MAI appraisal. *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), cert. denied, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

In accordance with the Plan, the property was transferred with Dade County's tax liens in place, and with no objection reserved in the Plan, or otherwise, to the validity of these tax liens. Conversely, the only preserved property tax question was the final amount of each of the tax assessments and the resulting tax liability. In fact, the Plan, with its contract for sale, required payment of the taxes and interest at closing. This payment was never made. Instead, an escrow fund was created in the amount of \$7,006,114.65 to ensure payment when the amount of each assessment was finally determined in the State court tax cases.

For the past 11 years the Miami Center Project has been involved in ad valorem tax litigation, contesting each and every assessment, not the first of which has been tried. This State court litigation continued with the full knowledge, consent and authorization of the Bankruptcy Court. During reorganization, the Bankruptcy Court authorized retention of special ad valorem tax

counsel, as well as expert witnesses for this litigation. It also authorized payment of large sums for costs and fees.

While taxes were paid in full for the years 1979 through 1981, in each year from 1982 through 1985 only a portion of the taxes was paid. Thus, the statutorily-created first priority ad valorem real property tax liens attaching to the property annually from 1982 through 1985 remain outstanding and unsatisfied.

Immediately following the October 1985 closing, settlement negotiations with the County were undertaken and continued through 1986. After reaching an impasse, Mr. Gould requested the Liquidating Trustee to

instruct Irving Wolff to file the complaint already prepared in the United States District Court to both bar the County's claim for not having filed Proofs of Claim in the Chapter XI proceeding and also for engaging in discriminatory and non-uniform assessment practices.³

Subsequent to dismissal of that district court action, *Miami Center Liquidating Trust v. Dade County, Fla.*, 75 Bankr. 61 (S.D. Fla. 1987), settlement discussions were again commenced between the County, the Liquidating Trustee and new counsel for the Trust, Herbert Stettin. Ultimately, a settlement was reached between the Liquidating Trustee and the County. As amended and approved it was a settlement of all of the issues and disputes between the parties. Pet. App. 63. It reduced the liability of the Trust for disputed 1979 through 1985 ad

³ Letter from Theodore B. Gould to Fred Stanton Smith, dated December 9, 1986, re: proposed settlement of 1979 through 1985 taxes.

valorem taxes to \$2,720,324 as of March 31, 1988. On November 18, 1988, the Bankruptcy Court entered a 12-page order approving the amended ad valorem tax settlement complete with detailed findings of fact and conclusions of law. Pet. App. 72.

SUMMARY OF ARGUMENT

The Petition for Certiorari should be denied. The Petition brings before this Court a single-sentence decision and opinion of the Eleventh Circuit Court of Appeals finding that the lower courts did not abuse their discretion in approving the ad valorem tax settlement. In that opinion, the Eleventh Circuit correctly affirmed the District Court decision, which in turn affirmed the Bankruptcy Court's findings and conclusions that the amended settlement of the ad valorem tax claims was reasonable and in the best interest of the Liquidating Trust and the creditors. The record overwhelmingly supports the Bankruptcy Court's findings and conclusions. In this appeal, Petitioners continue to insist on individual merit determinations of every property tax-related issue. The case law specifically holds, however, that the Debtors' arguments must be viewed as the Bankruptcy Court viewed them, i.e., in light of: (1) the probability of success; (2) the disastrous effect that the likely adverse result in the State court tax cases would have on the Liquidating Trust; and (3) the expense, inconvenience, and delay of continued litigation.

The Petition fails to demonstrate that the Eleventh Circuit decision departs from or conflicts with any decision of this Court or of any Circuit Court. Instead, the Petition constitutes in the main an untimely and impermissible collateral attack on certain features of the confirmed Plan of Reorganization. That Plan has long since become final and law of the case.

The priority and status of Dade County's real property tax liens were fully determined and firmly established vis-a-vis all classes of creditors in the confirmed Plan of Reorganization. The Bankruptcy Court could not have erred for failing to decide these questions of status and priority since it had already done so.

The ad valorem tax settlement properly disposed of 14 separate tax disputes pending in State court for as long as 9 years. These lawsuits had been recognized and continually dealt with in the administration of this bankruptcy at substantial expense to the estates of the Debtors. Termination of lawsuits by settlement is an appropriate function of a bankruptcy court. This was especially appropriate here where the significant economic advantage to the Liquidating Trust was found to substantially outweigh the devastating impact that adverse rulings would have had.

The ad valorem tax settlement also properly disposed of issues surrounding whether the County had filed a proof of claim. Resolution of the County's statutory ad valorem tax liens was necessary to achieve long overdue compliance with the Bankruptcy Court's 1985 Plan of

Reorganization. The Debtor's scheduling of the property tax liability, pre- and post-confirmation conduct of the parties and case law were correctly considered and applied by the lower courts in resolving the issues in this property tax settlement.

The Eleventh Circuit dispatched the claims of Petitioners herein in a single sentence, with no citation to authority. It is apparent that the Circuit Court viewed the Debtors' claims as lacking precedential significance. Thus, in addition to disposing of the issues correctly, the Circuit Court's single-sentence opinion lacks impact as stare decisis.

For the foregoing reasons, the Petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

- I. CERTIORARI JURISDICTION HEREIN IS LIMITED TO A REVIEW OF THE ELEVENTH CIRCUIT'S DECISION APPROVING THE AD VALOREM TAX SETTLEMENT AND DOES NOT INCLUDE REVIEW OF THE CONFIRMED PLAN OF REORGANIZATION OR OTHER UNRELATED ISSUES.**

By certiorari the Petitioners seek review of a single-sentence affirmance by the Eleventh Circuit Court of Appeals unequivocally holding that neither the Bankruptcy Court nor the United States District Court, Southern District of Florida, abused their discretion or acted

improperly in approving and affirming the comprehensive ad valorem tax settlement.⁴ The Liquidating Trustee of the Miami Center Liquidating Trust, the Bank of New York and the Dade County Taxing Authorities submitted this settlement to the Bankruptcy Court, Pet. App. 59, and the court approved the same. Pet. App. 71. Thereafter, the District Court affirmed with a thorough and extensive review. Pet. App. 34. The Eleventh Circuit affirmed.

The Bankruptcy Court order, from which the affirmances originate, is replete with thorough and extensive findings of fact and conclusions of law supporting the Court's approval of the comprehensive ad valorem tax settlement. Entry of this detailed order followed a two-day evidentiary hearing, submission of substantial testimony, documentary evidence and deposition testimony, exhaustive written closing arguments by the Petitioners and Respondents herein, a Bankruptcy Court-mandated amendment to the settlement in response to specific objections and complaints of the Petitioner/Debtors, and a final evidentiary hearing.

⁴ In its entirety this decision reads:

PER CURIAM:

The bankruptcy court had the authority to consider the settlement reached between the trustee and Dade County concerning questions surrounding outstanding ad valorem real property taxes and did not abuse its discretion in approving the settlement.

AFFIRMED. Pet. App. 32.

In rejecting the Petitioners' plea for specific merit determinations of every objection and legal claim proposed to be compromised by the tax settlement, the Bankruptcy Court explained the rationale for its approval of this settlement by quoting from *In re Teltronics, Inc.*, 762 F.2d 185 (2d Cir. 1985), as follows:

20 . . . The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. . . . Thus, this Court need not resolve each disputed matter in determining the propriety of the settlement, rather, the Court may, and should, make a pragmatic decision on the basis of all equitable factors. Pet. App. 80.

In paragraph 23 the Court continues,

One of the obligations imposed by *Jackson Brewing Corp., supra*, [624 F.2d 605 (5th Cir. 1980)] upon bankruptcy courts engaged in determining whether to approve a settlement proposed requires a consideration of 'all the factors bearing on the wisdom of the compromise'. The Court believes it has done so and it recognizes the benefits which flow to each of the parties involved. The taxing authorities received a substantial amount of cash and an end to time-consuming and expensive litigation on their part. The Bank of New York receives property free of any further claims by the taxing authorities, and the debtors receive the resolution of

County tax claims on excellent terms. In sum, having reviewed the evidence and the documents received into evidence, together with having considered the equities involved, the Court finds and determines that the amended settlement agreement does not 'fall below the lowest point in the range of reasonableness.' The terms of the amended settlement are reasonable and in the best interest of the liquidating trust. . . . Pet. App. 81-82.

This tax settlement resolved disputes over ad valorem taxes on the Miami Center property which had been valued by an MAI appraisal—accepted and relied upon by the courts administering this bankruptcy—at a fair market value of \$255.6 million. While this \$255.6 million valuation would have been probative of the fair market value of the subject property in the pending State court tax litigation seeking substantial assessment reductions, the \$162.5 million assessment for the tax years 1984 and 1985, utilized in the overall tax settlement, obviously achieved substantial savings and significant economic benefits to the Liquidating Trust necessarily inuring to the creditors.

Because the Petitioners continue to insist on entitlement to a merit determination of each separate aspect of the tax settlement, and because they continue to confuse and intermix in this proceeding the issues adjudicated or pending in other proceedings or between other parties, the Petition for Certiorari herein can best be understood by first briefly examining what this appeal does not involve.

This is not an appeal of the confirmed Plan of Reorganization for the five consolidated Petitioner/Debtors.

The provisions of that Plan were approved by the Bankruptcy Court⁵ in its order of confirmation entered August 8, 1985. The United States District Court affirmed⁶ and appeal thereof was dismissed by the Eleventh Circuit as moot.⁷ Certiorari was denied by this Court.⁸ The plan of reorganization has thus become law of the case.

This is not an appeal of the transfer from the individual Debtors to the Miami Center Liquidating Trust of right, title and interest in the fourteen ad valorem tax cases pending in State court. Transfer of control of those cases to the Miami Center Liquidating Trust was an integral part of the terms of the Amended Plan of Reorganization long since final and binding on the parties.

This is not an appeal of determinations of the individual classes of lienholders and creditors. These determinations were made as an integral part of the Amended Plan of Reorganization approved by the Bankruptcy Court on August 8, 1985, now final and the law of the case.

This is not an appeal of the income tax issues that pend in the Eleventh Circuit Court of Appeals. The Internal Revenue Service is not now and never has been an objector to the ad valorem tax settlement and related issues involved herein.

This is not an appeal of numerous orders entered by the Bankruptcy Court at the request of both the

⁵ *In re Holywell Corp.*, 49 Bankr. 694 (Bankr. S.D. Fla. 1985).

⁶ *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986).

⁷ *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988).

⁸ 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988).

Liquidating Trustee and/or the Petitioners pre- and post-confirmation which specifically authorized (1) the filing of additional State court tax cases; (2) use of Trust assets to make partial payments of property taxes; (3) use of Trust assets to maintain the State court tax litigation through the payment of court costs, attorney's fees and expert witness fees; and (4) authorizing retention of special counsel and expert witnesses for prosecuting the State court tax litigation. These orders long since became final and the law of the case.

This is not an appeal of any pre-confirmation (i.e., timely-filed) adversary complaint to determine the extent, priority and/or validity of Dade County's real property tax liens. This is so because no such complaint was ever filed. Moreover, the priority and validity of these liens was fully recognized and established in the Amended Plan of Reorganization as confirmed by the Bankruptcy Court and now the law of the case.

This is not an appeal of the creation of the escrow fund done as a post-confirmation pre-sale amendment to the plan of reorganization and contract for sale of the Miami Center property to the designee of the Bank of New York. This fund was created at the time of closing to ensure that there could be an ultimate delivery of the Miami Center Project to the Bank of New York free and clear of liens in accordance with the Amended Plan, and at the same time allow the Debtors and/or Liquidating Trust to continue toward reaching a final resolution of the State court tax cases without being prejudiced by having to comply with the Amended Plan's requirement—payment in full of pending tax liens. Creation of this fund—as well as its specific designation for the payment of property taxes—has long since become final pursuant to

orders of the Bankruptcy Court, no appeal of which remains pending.

Finally, this is not an appeal of any equal protection or constitutional objection to the individual tax assessments on the Miami Center property for the years 1979 through 1985. When the Bankruptcy Court approved the tax settlement, these objections had been raised and/or remained pending in the State court for as long as nine years without any resolution thereof in fourteen separate tax cases. Not one of these cases was ever litigated to finality nor were any of the Debtors' constitutional challenges ever proven.

Consequently, in the event this Court were to grant the Petition for Certiorari, the only issue before this Court would be the propriety *vel non* of the Eleventh Circuit decision. In one sentence, the Circuit Court rejected (without citation to authority) all of Petitioners' claims. See note 4 at p. 8, for the text of the Eleventh Circuit decision. In addition to being correct, the Circuit Court decision approving settlement of property tax claims does not conflict either facially or in principle with any other circuit court decision or with any decision of this Court. The Petition should be denied.

II. THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN APPROVING THE AD VALOREM TAX SETTLEMENT EITHER BY FAILING TO DETERMINE THE COMPARATIVE PRIORITY OF CLAIMS AGAINST THE ESTATE, OR BY FAILING TO DETERMINE THE ESTATE'S NET VALUE.

The voluminous evidence and argument amassed in response to the Motion for Approval of the ad valorem

tax settlement and addressed in the orders of the Bankruptcy Court, District Court, and the Eleventh Circuit Court of Appeals make it amply clear that the Bankruptcy Judge herein fully apprised himself of all of the facts, equitable considerations and legal principles necessary to make a reasoned and lawful decision approving the tax settlement. Notwithstanding the welter of evidence and legal argument below, Petitioners ask this Court to grant certiorari review, belatedly asserting that the Bankruptcy Court abused its discretion in approving the tax settlement for the alleged reasons that it did not adequately determine either the priority of tax claims or the net value of assets in the bankruptcy estate.

First and foremost, conspicuous by its absence from the record herein is any such contention by way of argument, evidence or legal objection presented to the Bankruptcy Court in opposition to the settlement.

Second, wholly ignored by the Petitioners is that the status of Dade County's property tax liens was fully determined and established with the Bankruptcy Court's approval of the amended plan of reorganization in August of 1985 and implementation thereof with the closing on the contract for sale of the Miami Center in October of 1985. Pursuant thereto, the superiority of these tax liens was fully recognized and established and the payment thereof required as a condition precedent to delivery of Miami Center to the Bank of New York or its designee free and clear of liens. This determination of priority, vis-a-vis the eight classes of creditors defined in the Amended Plan, became law of the case when the Eleventh Circuit Court of Appeals dismissed as moot the

Debtors' attack on the amended plan of reorganization.⁹ Having determined the superiority of the tax liens in August of 1985, and having never been asked by the Debtors or anyone else to revisit this issue at the April and November 1988 hearings on the tax settlement, the Bankruptcy Court cannot be said to have abused its discretion because it failed to redecide that already decided.

Third, no evidence was adduced below supporting the Debtors' reliance upon the decision in *Matter of Aweco, Inc.*, 725 F.2d 293 (5th Cir.), *cert. denied*, 469 U.S. 80, 105 S.Ct. 244, 83 L.Ed.2d 182 (1984). No creditors—senior or junior—have raised a single objection to the Comprehensive Tax Settlement. Moreover, there is no evidence supporting Petitioners' suggestion that the assets of the Liquidating Trust are insufficient to pay any creditors whose claims might be senior to those of Dade County. Approval of the ad valorem tax settlement in November of 1988 enabled the Liquidating Trustee to finally achieve compliance with the requirements of the Amended Plan. By virtue thereof, the escrow fund—as an escrow fund and not property of the Liquidating Trust—became available for distribution.

The Plan of Reorganization required satisfaction of Dade County's real property tax liens prior to conveyance of the property to the nominee of the Bank of New York. For the sole purpose of allowing a continuation of the State court proceedings objecting to the amount—as distinguished from the validity—of the County's real

⁹ In their appeal of the order confirming the amended plan of reorganization, the Debtors never objected to the provisions dealing with payment of the ad valorem tax liens as superior first priority tax liens.

property taxes, an escrow fund of \$7,006,114.65 was established at the time of the closing on the Miami Center property. Notwithstanding the Debtors' assertions to the contrary, this escrow fund never became property of the Liquidating Trust. For three years after the October 1985 closing, the State court tax assessment cases continued accruing interest and further draining the estate of assets expended for attorney's fees and expert witness fees. At the end thereof, not a single State court action had been brought to conclusion. As a result of the Comprehensive Tax Settlement, a net of \$2,720,325 as of March 31, 1988 plus interest was payable for Dade County taxes, releasing the balance of said escrow fund, \$4,285,790 plus interest, to the Trust as Trust property for payment of its other liabilities. Approval of the tax settlement greatly reduced liabilities of the Liquidating Trust, increased its assets, and, as found by the Bankruptcy Court, was fair, reasonable and in the best interest of the Liquidating Trust, its creditors and beneficiaries.

The tax settlement allowed for compliance with the previously-approved Amended Plan of Reorganization, by finally satisfying pending tax liens on property which was required to be conveyed free and clear thereof. It settled the amount of tax liability which had been pending for as long as nine years. It terminated the endless expenses to the Liquidating Trust of continuing this litigation, and it assured the availability of additional assets —earmarked three years earlier for the payment of ad valorem taxes—for other creditors and beneficiaries of the estate. Consequently, the Bankruptcy Court did not abuse its discretion or otherwise violate the principles of law enunciated by the Fifth Circuit Court of Appeals in *Matter of Aweco. Id.*

Fourth, well illustrative of the equitable factors before the Bankruptcy Court in its consideration of whether to approve the tax settlement was the Petitioners' own conduct before the Bankruptcy Court for the four years between August of 1984 and November of 1988 in dealing with the tax controversies. The Bankruptcy Court had been asked to and did appoint special counsel for handling the State court tax cases. Retention of various experts for that litigation had been authorized. Expert witness and attorney fee awards had been approved. Not only had the Liquidating Trustee acquired the lawsuits by operation of the Plan of Reorganization, but dominion and control thereover had been a familiar part of the administration of these bankruptcy estates. From the inception of these bankruptcies, the Debtors scheduled claims for taxes and led the Bankruptcy Court, Dade County and all other parties to believe that the Debtors were disputing only the amount—as distinguished from the validity of the tax claims. District Judge Kehoe recounted the Bankruptcy Court's anger when two and one-half years after the commencement of these proceedings the Chief Bankruptcy Judge learned that the Debtors and Liquidating Trustee were, then, for the first time attempting by an action in the United States District Court to challenge the validity of the tax liens, as well as the propriety of the assessments on constitutional and equal protection grounds. The Court concluded this new strategy was "playing games" and that:

This is the first moment since the beginning of this lawsuit that it has been indicated to me in any respect that the status of the County tax claim as a claimant against this estate is not recognized because no claim was filed. It is the

first time that it has been hinted. The Debtor recognized it constantly and you have recognized it constantly up until now, you have set aside a reserve for it, and now you are saying this whole matter must be decided in a court that cannot even hear it earlier than a year from now because no claim was filed. I am appalled.

Miami Center Liquidating Trust v. Dade County, 75 Bankr. 61, 64 (S.D. Fla. 1987).

Inconsistencies and position changes by these Petitioners are not new in these proceedings. While the Petitioners continued to object to the approved settlement satisfying the Liquidating Trustee's liability for disputed ad valorem taxes with \$2.7 million plus interest from the escrow fund, the Debtors ignore their own scheduling of tax liability to Dade County in the amount of \$4,959,186.16. App. 3. When reminded of this scheduling on Court Paper 121, the Petitioners simply averred in their Reply Brief to the Eleventh Circuit Court of Appeals that they mistakenly omitted designation of the claim as contingent, disputed or unliquidated. The approved tax settlement certainly satisfied the tax liability for an amount substantially less than that listed on the Petitioner/Debtors' own schedules. Standing alone, this fact is sufficient to sustain affirmance of the Bankruptcy Court's approval of the ad valorem tax settlement. The Bankruptcy Court is a court of equity. *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 527, 104 S.Ct. 1188, 1197, 79 L.Ed.2d 482, 496 (1983).

Approval of the tax settlement was not an abuse of discretion. The United States District Court, Southern District of Florida, and the Eleventh Circuit fully and completely reviewed all issues raised and/or re-raised by

the Petitioners herein. The Plan of Reorganization has long since become final, has been substantially consummated and is incapable of being unwound so as to restore the parties to the status quo. *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1554 (11th Cir.), cert. denied, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). Its requirement of full payment of Dade County's real property taxes necessarily established the priority of the tax liens as of the time of its approval, August 8, 1985. With this Court's denial of certiorari in 1988, the priority of payment of claims as an integral part of the approved Plan of Reorganization became final. The Bankruptcy Court in approving the ad valorem tax settlement did not abuse its discretion and did not fail to make full and complete findings as were necessary for a reasoned and proper judgment.

III. THE BANKRUPTCY COURT ACTED WITHIN ITS AUTHORITY AND DID NOT ABUSE ITS DISCRETION IN APPROVING THE AD VALOREM TAX SETTLEMENT WHICH NECESSARILY DISPOSED OF STATE COURT TAX CASES.

Petitioners suggest to this Court, as they have in every earlier facet of these proceedings, that the Bankruptcy court acted improperly in approving the tax settlement because that approval necessarily resolved the pending State court tax cases. Petitioners' logic is flawed and certainly falls far short of any demonstration that the decision of the Eleventh Circuit Court of Appeals herein is either "(a) . . . in conflict with the decision of another United States court of appeals on the same matter; . . . or (c) . . . decided an important question of federal law which

has not been, but should be, settled by this Court. . . . " Sup. Ct. R. 10.

First, a fundamental aspect of the property tax settlement as approved by the Bankruptcy Court was that it was to operate as a resolution of all related property tax disputes. In addition to fixing with certainty the amount of tax liability as between the parties, the settlement terminated ongoing liability for court costs and attorney's fees. Finalizing the amount of liability for the Liquidating Trust is harmonious with the spirit and intent of the Bankruptcy Code.

Second, Petitioners' suggestion that the State court actions should not have been settled because the tax questions were pending in courts other than the Bankruptcy Court is frivolous in the context of bankruptcy proceedings. While the Petitioners continue to advance this position, the Eleventh Circuit Court of Appeals in a related proceeding categorically rejected Petitioners' chastisement of the Bankruptcy Court for settling non-bankruptcy court cases. As therein stated:

Dismissal of lawsuits that are assets of the estate is a not-unfamiliar feature of reorganization plans. The Debtors' suggestion that the Bankruptcy Court lacks power, exercised pursuant to a reorganization plan, to direct a trustee to dismiss a suit in a court other than the bankruptcy court is not supported by authority cited to us or by common sense.

Miami Center Limited Partnership v. Bank of New York, *supra*, 838 F.2d at 1557.

Third, the Petitioners attempt to create a distinction between the 1979 through 1982 and the 1983 through 1985

overassessment State court tax cases based upon whether either a refund of taxes or reduction in tax liability was sought. Such distinction is meritless as one without a legal difference. The result of the tax settlement was to achieve finality of the Liquidating Trust's liability for taxes, interest, court costs and attorney's fees. The approved settlement did that. The Bankruptcy Court's approval thereof was proper, not an abuse of discretion, and not outside the court's jurisdiction.

Fourth, as they have in each of the lower courts, consistent with their position over the past eleven years, the Petitioners continue to argue that the settlement is improper because either each of the initial tax assessments or the settlement as approved by the Bankruptcy Court is discriminatory or constitutes a denial of equal protection. From 1979 through 1985 the Petitioners filed State court actions challenging every assessment of the Miami Center Project on the basis of alleged discrimination. The Petitioners *never* proved any such discrimination. From 1984 through 1988 when the Bankruptcy Court approved the tax settlement, these tax cases had remained pending with the blessing of the Bankruptcy Court, yet no judicial finding of discrimination was ever made. The Petitioners also took their claims of discriminatory assessment practices to the United States District Court, Southern District of Florida, after their attempts to reach a settlement with Dade County taxing officials had failed. They were similarly unsuccessful in establishing the validity of these claims. *Miami Center Liquidating Trust v. Dade County, Fla.*, 75 Bankr. 61 (S.D. Fla. 1987).

Best illustrative of why the Petitioners have been wholly unable to prove discrimination is their own convoluted aberration of the record in these proceedings with respect to the tax assessments here at issue. (1) Petitioners argue on page 26 of their Petition that because the Florida Supreme Court in *Southern Bell Telephone and Telegraph Co. v. County of Dade*, 275 So.2d 4, 9 (Fla. 1973), held that "the price at which property is sold as indicated by documentary stamps on the instrument is *prima facie* evidence of its value . . .," the 1979 assessment on the subject property, \$1,373,024 higher than the purchase price, is discriminatory. It is axiomatic in tax assessment law that one sale does not a market make. The sale in question occurred fourteen months after the 1979 assessment was made. More importantly, if one is to accept as correct the Petitioners' reliance upon their suggested application of *Southern Bell*, then it must follow that the 1984 and 1985 tax assessments on the Miami Center Project settled at \$162.5 million for each year should be increased to the \$255.6 million price reflected by the sales contract closed on October 10, 1985. Of course, this Court can readily perceive the economically disastrous results that such increased assessments would have on the Liquidating Trust's ability to pay remaining creditors. (2) Petitioners have attempted to elicit this Court's sympathy for their equal protection arguments by their claim in note 29, page 26, that the 1984 assessment on the hotel portion of the property, as reduced by the settlement, was allegedly further reduced by 38% for the 1989 assessment. The 1989 tax assessment on the hotel is certainly nowhere in the record. Without a detailed response thereto, but so that this Court be correctly informed, suffice it to say that

the property assessed as the hotel in 1989 was substantially different than that assessed as the hotel in earlier years because of a redistribution and/or reallocation of portions of the original hotel property (parking, commercial and retail space) to other folio numbers. The 1989 assessment on the total Miami Center Project exceeded the settlement value for 1984 notwithstanding the Petitioners' erroneous statement to the contrary.

From the foregoing it should be apparent that Petitioners' repeated attempts to "examine the trees and ignore the forest" is simply not a meaningful tool for the review of this comprehensive tax settlement. Not only do the Petitioners misconstrue the record and non-record facts upon which they attempt to build their legal arguments, but their legal arguments fall far short of constituting any basis for certiorari review by this Court.

Both the Bankruptcy Court and District Court opinions discussed at length principles related to the Petitioners' equal protection arguments. While Petitioners continue to insist that they are entitled to a "merit determination" or mini-trial on their alleged claims of discrimination, they have wholly failed to establish its existence in either the original assessments or the settlement values approved by the Bankruptcy Court. The lower court's decisions are not in conflict with any decision cited by the Petitioners. The Petitioners' continued pronounced beliefs of the existence of discrimination simply do not take the place of proof necessary to establish its existence. The record before the Bankruptcy Court lacked a proffer of the slightest scintilla of expert evidence showing the existence of any such discrimination. Similarly, nothing but the Petitioners' own suggestions of comparability

with respect to several parcels of property mentioned in the Petition establishes their comparability from an assessment standpoint. Moreover, the record and Petitioners' own unsupported assertions do not suggest disparity between the assessments of the subject property and comparable properties in the magnitude of 800% to 3,500% which formed the basis of this Court's decision in *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1988).

The Bankruptcy Court properly evaluated the risks, liabilities, benefits and gains associated with continuation of the fourteen separate State court actions. The lawsuits in question were clearly assets of the Liquidating Trust and as such the settlement thereof was a proper function in the administration of this bankruptcy. The Petitioners have wholly failed to establish that the Eleventh Circuit's single-sentence affirmance conflicts with any decisions of the other Circuit Courts of Appeal or of this Court on the question of discrimination, or improperly decides a federal question.

IV. FILING OF A CLAIM IN THIS BANKRUPTCY PROCEEDING IS NOT RELEVANT BECAUSE THE CONFIRMED PLAN OF REORGANIZATION PROVIDED FOR PAYMENT OF DADE COUNTY'S STATUTORY AD VALOREM PROPERTY TAX LIENS IN FULL FROM THE PROCEEDS OF SALE.

The following section responds to sections II and IV of the Petition. The Debtors introduce the second issue in their Petition with the following one-sentence paragraph:

A Writ should be issued to determine whether a bankruptcy court has statutory authority

to confirm a plan granting a local government taxing authority preferential treatment, which provides for the Dade County Tax Collector's participation in the distribution of the estate, notwithstanding his failure to file timely proofs of claim or an application for payment as administrative expenses of disputed real property taxes. Pet. 16. (Emphasis supplied).

Confirmation of the Plan has long since become final and the Petitioners' attempt to again attack its provisions is beyond the Court's certiorari jurisdiction in this proceeding. Similarly, Petitioners' final and retreating argument, under point IV, was disposed of by provisions of the confirmed Plan of Reorganization, and is therefore beyond the Court's certiorari jurisdiction herein.

Unfortunately for the Petitioners, the Plan the terms of which they here still attempt to contest has long since been confirmed by the Bankruptcy Court, substantially consummated, and subjected to three layers of judicial review, including a petition for certiorari to this Court. See notes 6, 7 and 8, *supra*. Petitioners have had their days in court. See text accompanying note 2, *supra*. Petitioners' present attempt to seek review of features of the confirmed Plan providing for payment of the real property ad valorem taxes on the Miami Center Project is therefore untimely and improper.

In contravention of the confirmed plan, Petitioners argue that they have a vested legal right to recover certain expenses and that the County is precluded from obtaining payment in satisfaction of tax liens because no claim was filed. Pet. 16-21; 28-30. It is axiomatic that Petitioners' failure to raise these objections in response to the proposed plan of reorganization constitutes waiver. If

the objections had been timely made and considered justified by the Bankruptcy Court or creditors, the Bank of New York, as proponent of the Plan, need only have reduced its proposed purchase price by the amount of the ad valorem property tax liens, and purchased the property subject to the liens. This is true because if not paid under the Plan, the County would have been free to enforce its unimpaired liens in state court against the collateral. See *In re Folendore*, 862 F.2d 1537 (11th Cir. 1989); *Lindsey v. Federal Land Bank of St. Louis*, 823 F.2d 189 (7th Cir. 1987); *Tarnow v. Commodity Credit Corporation*, 749 F.2d 464 (7th Cir. 1984); *In re Sillani*, 9 Bankr. 188, 189 (Bankr. S.D. Fla. 1981). For the court to have subject matter jurisdiction thereover, a debtor must question the validity of a lien *prior* to, not five years after, confirmation. This principle applies to real property tax liens. *In re Work*, 58 Bankr. 868, 869 (Bankr. D. Ore.), *aff'd*, case no. CV86-1028FR (D. Ore. November 21, 1986).

The Eleventh Circuit dispatched the claims of Petitioners herein in a single sentence, with no citation to authority. It is apparent that the Circuit Court viewed the Debtors' claims as lacking precedential significance. Thus, in addition to disposing of the issues correctly, the Circuit Court's single-sentence opinion lacks impact as *stare decisis*. See note 4 at p. 8.

Moreover, there is nothing surrounding Petitioners' proof of claim argument which makes it any less capable of being resolved by settlement than the other issues resolved by the Bankruptcy Court's order approving the comprehensive property tax settlement. The record below amply demonstrates that the Petitioners' arguments were

given full consideration and contributed to the substantial economic savings realized by the Trust from the settlement.

CONCLUSION

The Eleventh Circuit's single-sentence affirmance of the District Court's affirmation of the Bankruptcy Court's decision approving the amended settlement of ad valorem tax claims is correct. The Circuit Court decision does not conflict, either facially or in principle, with any decisions of this Court or of any circuit court.

The Petition should be denied.

Respectfully submitted,

ROBERT A. GINSBURG
Dade County Attorney
Metro-Dade Center
Suite 2810
111 N.W. 1st Street
Miami, Florida 33128-1993
(305) 375-5151

JAMES K. KRACHT
Assistant County Attorney

and

DANIEL A. WEISS
Counsel of Record
Assistant County Attorney
*Attorneys for Dade County,
Joel Robbins & Fred Ganz*



APPENDIX

**Voluntary Petition Under Chapter 11;
Case No. 84-01593-BKC-TCB;
In Re: Chopin Associates**



App. 1

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

In re) CASE NO.
CHOPIN ASSOCIATES,) 84-01593-BKC-TCB
a Florida General Partnership) (Chapter 11)
I.D. NO. 52-1167860) VOLUNTARY
Debtor) PETITION
Include here all names) UNDER
used by debtor within last 6 years) CHAPTER 11
)

RELIEF ORDERED

1. Petitioner's post-office address is 100 Chopin Plaza, Miami, Florida 33131
2. Petitioner has had his principal place of business (or principal assets) within this district for the 180 days immediately preceding the filing of this petition (or for a longer portion of the 180 days immediately preceding the filing of this petition than in any other district).
3. Petitioner is qualified to file this petition in that he is qualified to be a debtor under Chapter 7 of the Bankruptcy Code as a voluntary debtor.
4. A schedule of debtor's assets and liabilities and a statement of debtor's financial affairs (or a list of debtor's creditors) accompanies this petition (or a list of debtor's creditors accompanies this petition).

App. 2

Wherefore, petitioner prays for relief under Chapter 11 of the Bankruptcy Code.

KENT WATTS DURDEN KENT
NICHOLS & MICKLER

Signed: /s/ illegible

Attorney for Petitioner

Petitioner

(Petitioner sign if not
represented by attorney.)

Address 850 Edward Ball Building

Jacksonville, Florida 32202

CERTIFICATION

INDIVIDUAL: I, ___, the petitioner named in the foregoing petition, certify under penalty of perjury that the foregoing is true and correct.

CORPORATION: I, ___, the president (or other officer or an authorized agent) of the corporation named as petitioner in the foregoing petition certify under penalty of perjury that the foregoing is true and correct, and that the filing of this petition on behalf of the corporation has been authorized.

PARTNERSHIP: I, Theodore B. Gould, President of Miami Center Corporation, General Partner of Chopin Associates, a Florida General Partnership, a substitute (or an authorized agent) of the partnership named as petitioner in the foregoing petition, certify under penalty of perjury that the foregoing is true and correct, and that the

App. 3

filing of this petition on behalf of the partnership has been authorized.

Executed on: August 22, 1984

Signed: /s/ Theodore B. Gould
Theodore B. Gould

App. 4

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO.
CHAPTER 11**

**IN RE:
THEODORE B. GOULD
Debtor.**

**LIST OF TWENTY LARGEST UNSECURED
CREDITORS**

There is one unsecured creditors [sic] of this Debtor.

DATED this 22nd day of August, 1984.

/s/ Theodore B. Gould
Theodore B. Gould

App. 5

CHOPIN ASSOCIATES
ACCOUNTS PAYABLE/ACCRUED LIABILITIES
JULY 31, 1984

Tax Collector-Dade County

4,959,186.16

App. 6

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.
CHAPTER 11

IN RE:

CHOPIN ASSOCIATES, a
Florida General Partnership,
Debtor.

LIST OF ALL CREDITORS

Attached hereto is list of all creditors to the Debtor.

DATED this 22nd day of August, 1984.

CHOPIN ASSOCIATES
By: /s/ Theodore B. Gould

App. 7

**CHOPIN ASSOCIATES
ACCOUNTS PAYABLE/ACCRUED LIABILITIES
JULY 31, 1984**

Bank of New York	\$ 33,682,791.94
Tax Collector-Dade County	<u>4,959,186.16</u>
	<u><u>\$ 38,641,978.10</u></u>

App. 8

CERTIFICATE OF RESOLUTION

STATE OF FLORIDA)
COUNTY OF DADE) SS.
)

Before me, the undersigned authority, this day appeared THEODORE B. GOULD, to me known and known to me to be the President of MIAMI CENTER CORPORATION, a Florida corporation, who after being first duly sworn upon oath did depose and say that the following Resolution was duly adopted at a Special Meeting of the Board of Directors of MIAMI CENTER CORPORATION, a Florida corporation, at 3:30 p.m. on the 21st day of August, 1984, at Miami, Florida:

RESOLVED: That this Corporation, as a General Partner of Chopin Associates, a Florida General Partnership, execute and file a Petition for a voluntary Chapter 11 under the Bankruptcy Reform Act of 1978 for Chopin Associates and that KENT, WATTS, DURDEN, KENT, NICHOLS & MICKLER, Attorneys at Law, be retained as counsel for the purpose of preparing, presenting and filing said Petition and to represent Chopin Associates in the proceedings.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Theodore B. Gould
THEODORE B. GOULD, President

Sworn to and subscribed before me
this 21st day of August, 1984.

App. 9

/s/ illegible

Notary Public, State of Florida

My Commission expires:

Notary Public; State of Florida at Large

My Commission Expires June 29, 1986

MOTION FILED
NOV 28 1990

NO. 90-761

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CHOPIN ASSOCIATES, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its Partners, and MIAMI CENTER LIMITED PARTNERSHIP, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its GENERAL PARTNERS,

Petitioners,

v.

FRED STANTON SMITH, Trustee, THE BANK OF NEW YORK, CITY NATIONAL BANK OF FLORIDA, as Trustee of Land Trust #5008793, DADE COUNTY, FLORIDA, a Municipality, JOEL ROBBINS, as Property Appraiser of Dade County, Florida, FRED GANZ, as Tax Collector of Dade County, Florida, RANDALL MILLER, as Executive Director of the Florida Department of Revenue, S. HARVEY ZIEGLER, as Escrow Agent for the Miami Center Liquidating Trust, and HERBERT STETTIN, as Escrow Agent for the Miami Center Liquidating Trust,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

MOTION FOR DEFERRAL OF
CONSIDERATION OF PETITION

Petitioners Miami Center Limited Partnership and Chopin Associates¹ hereby respectfully move for deferral of consideration of the petition for writ of certiorari pending resolution of a related aspect of the case that could make consideration of the petition unnecessary.

This case arises out of Chapter 11 bankruptcy proceedings involving the Miami Center Limited Partnership (as well as certain related entities and persons), which developed the Miami Center, a hotel, office and retail complex in Miami, Florida. On August 8, 1985, the bankruptcy court confirmed a Plan of Reorganization (the "Plan") proposed by The Bank of New York ("BNY"), the major secured creditor of the debtors. The central feature of the Plan was the sale by a court-appointed trustee (the "trustee") of the Miami Center to BNY's designee. The issue raised by the petition for certiorari is whether the bankruptcy court's approval of a settlement for the payment of approximately \$10 million of real estate taxes was proper under the bankruptcy law.

A related aspect of the case now pending in the Eleventh Circuit, however, could require the bankruptcy court to reassess the Plan, rendering a decision by this Court on this issue possibly irrelevant to the ultimate resolution of the case. The related aspect of the case raises the question whether the trustee is required to file income tax returns on behalf of the

¹ Related entities are listed in the Petition for Certiorari at pp. ii through xvi.

debtors and pay income taxes pursuant to I.R.C. § 6012(b)(3) or (4) and I.R.C. § 6151(a), or otherwise.²

The trustee brought a declaratory judgment action seeking resolution of the question whether he was required to file returns and pay taxes. In a split decision, a panel of the Eleventh Circuit decided that the trustee is not required to file federal income tax returns or pay federal income taxes. On November 6, 1990, the debtors filed a petition for rehearing and suggestion of rehearing in banc. Should the Eleventh Circuit grant rehearing or rehearing in banc and reverse, the bankruptcy court would be required to reevaluate the Plan of Reorganization because of the potential significant tax liabilities the trustee will have incurred -- liabilities that were not provided for in the Plan. Should that decision of the Court of Appeals stand, review on certiorari and reversal by this Court of that decision would lead to the same result. If the bankruptcy estates incur a substantial federal income tax liability which was not provided for in the plan, then their ability to pay the real estate taxes in the current petition would be jeopardized.

Finally, deferral of consideration of the current petition for a writ of certiorari will not prejudice the Respondents. The Respondents are not awaiting the execution of judgment; nor is there any coercive relief against the respondents.

² 28 U.S.C. § 960 (1988) and 31 U.S.C. § 3713 (1988) also require court-appointed trustees and other receivers of insolvent business entities to pay taxes and other debts to the United States.

We therefore respectfully request that the Court defer consideratin of this petition for a writ of certiorari until resolution of the tax question now pending before the Eleventh Circuit.

Respectfully submitted,

Robert M. Muselman

ROBERT M. MUSELMAN
413 Seventh Street, N.E.
Charlottesville, Virginia 22901
(804) 977-4500

Attorney for Petitioners Miami
Center Limited Partnership, and
Chopin Associates

Of Counsel:

Dennis G. Lyons
Stuart E. Seigel
Kent A. Yalowitz

ARNOLD & PORTER
65 East 55th Street
New York, New York 10022
(212) 750-5050

November 28, 1990

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by regular United States Mail first-class postage prepaid on November 28, 1990, to the following:

VANCE E. SALTER, ESQ.
Coll, Davidson, Carter,
Smith, Salter & Barkett
100 Chopin Plaza
3200 Miami Center
Miami, Florida 33131

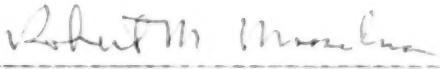
S. HARVEY ZIEGLER, ESQ.
Kirkpatrick & Lockhart
20th Floor, Miami Center
100 Chopin Plaza
Miami, Florida 33131

JEFFREY DIKMAN, ESQ.
Office of the Attorney General
The Capitol, Tax Section
Tallahassee, Florida
32399-1050

THOMAS F. NOONE, ESQ.
Emmet Marvin & Martin
48 Wall Street
New York, New York 10005

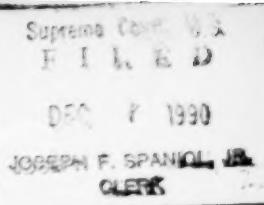
HERBERT STETTIN, ESQ.
Suite 2215, AmeriFirst Bldg.
One S.E. Third Avenue
Miami, Florida 33131

JAMES KRACHT, ESQ.
DANIEL WEISS, ESQ.
Assistant County Attorneys
Suite 2810
Metro-Dade Center
111 N.W. First Street
Miami, Florida 33128



Robert M. Musselman

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1990



CHOPIN ASSOCIATES, acting by Theodore B. Gould and
Miami Center Corporation, its Partners, and
MIAMI CENTER LIMITED PARTNERSHIP,
acting by Theodore B. Gould and
Miami Center Corporation,
its General Partners,

Petitioners,

v.

FRED STANTON SMITH, Trustee, THE BANK OF NEW YORK,
CITY NATIONAL BANK OF FLORIDA, as Trustee of
Land Trust #5008793, DADE COUNTY, FLORIDA,
a Municipality, JOEL ROBBINS, as Property
Appraiser of Dade County, Florida,
FRED GANZ, as Tax Collector of
Dade County, Florida,
RANDY MILLER, as Executive Director of
the Florida Department of Revenue,
S. HARVEY ZIEGLER, as Escrow Agent
for the Miami Center Liquidating Trust, and
HERBERT STETTIN, as Escrow Agent
for the Miami Center Liquidating Trust.

Respondents.

CASE NO. 90-761

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

RESPONDENT, THE BANK OF NEW YORK'S,
OPPOSITION TO PETITIONERS'
"MOTION FOR DEFERRAL"

Respondent, The Bank of New York (the "Bank"),* respectfully submits this response in opposition to the Petitioners' "Motion for Deferral and Consideration of Petition". That motion should be denied for the following reasons:

1. Neither the rules nor the reported decisions of this Court contemplate an indefinite "deferral" while another case is determined by a lower court.

2. There is no relationship between the issues in this case -- which seeks review of the Eleventh Circuit's per curiam, unpublished affirmation of a real estate tax settlement with Dade County, Florida -- and the federal income tax issues involved in the appeal now pending on a petition for rehearing en banc in the Eleventh Circuit and described in the motion. In re Holywell Corp., 911 F.2d 1539 (11th Cir. 1990).

3. The petition in this case is frivolous. It is the eighth attempt by the same Petitioners to obtain review by this Court of lower court bankruptcy decisions. The decisions have already been reviewed by the district courts and courts of appeals. The Petitioners have commenced over fifty appeals from lower court orders and have attempted to re-litigate issues already decided and reviewed through the level of certiorari. This Court has denied all five previous petitions for certiorari and one for mandamus and prohibition, upon which the Court has

*Pursuant to Supreme Court Rule 29, the relationships of the Bank are attached as Exhibit "A".

ruled. The "motion for deferral" is as frivolous as the petitions.

It is respectfully submitted that the motion should be denied.

Respectfully submitted,

S. Harvey Ziegler, Esq.
KIRKPATRICK & LOCKHART
2000 Miami Center
201 South Biscayne Blvd.
Miami, Florida 33131
Tel: (305) 374-8112

Of Counsel:

Thomas F. Noone, Esq.
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10286
Tel: (212) 422-2974

COLL DAVIDSON CARTER SMITH
SALTER & BARKETT, P.A.
3200 Miami Center
201 South Biscayne Blvd.
Miami, Florida 33131
Tel: (305) 373-5200

By: Vance E. Salter
Vance E. Salter

Certificate of Service

I HEREBY CERTIFY that on the 7th day of December, 1990, true copies of the foregoing were mailed to:

Herbert Stettin, Esq.
2215 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Tel: (305) 374-3353

Theodore B. Gould
Holywell Corporation
2568 Ivy Road
Charlottesville, VA 22901
Tel: (804) 295-7125

Robert M. Musselman, Esq.
Musselman and Associates
413 Seventh Street, N.E.
Charlottesville, VA 22902
Tel: (804) 977-4500

Dennis G. Lyons, Esq.
Stuart E. Seigel, Esq.
Kent A. Yalowitz, Esq.
Arnold & Porter
65 East 55th Street
New York, New York 10022
Tel: (212) 750-5050

Jeffrey Dikman, Esq.
Office of the Attorney General
The Capitol, Tax Section
Tallahassee, Florida 32399-1050

James Kracht, Esq.
Daniel Weiss, Esq.
Assistant County Attorneys
2810 Metro Dade Center
111 N.W. First Street
Miami, Florida 33128



Vance E. Salter

03VS120790

EXHIBIT "A"

The following is a listing of the relationships of The Bank of New York:

(a) Parent of the Bank - The Bank of New York Company, Inc.

(b) "Affiliates" of The Bank are:

BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.C.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

City National Bank was joined below solely in its capacity as the trustee of a land trust. It is not affiliated with the Bank.